

7517

I N S E N A T E

May 6, 2016

Introduced by Sen. HASSELL-THOMPSON -- read twice and ordered printed,
and when printed to be committed to the Committee on Finance

AN ACT to amend the executive law, the penal law and the state finance law, in relation to minority and women-owned businesses post completion certification, duties of the director, the crime of scheme to defraud and creating the minority and women-owned business fund

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

1 Section 1. The executive law is amended by adding a new section 314-a
2 to read as follows:

3 S 314-A. POST COMPLETION CERTIFICATION. THE DIRECTOR, IN COLLABORATION
4 WITH THE DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT AND THE
5 DEPARTMENT OF SMALL BUSINESS SERVICES, SHALL DEVELOP THE FOLLOWING
6 STANDARDIZED CERTIFICATION FORMS THAT MUST BE COMPLETED UNDER PENALTY OF
7 PERJURY PRIOR TO THE PRIME CONTRACTOR BEING PAID:

8 1. CERTIFICATION FROM A REPRESENTATIVE OF THE PRIME CONTRACTOR THAT
9 THE MINORITY OR WOMEN-OWNED BUSINESS IN FACT PERFORMED THE SERVICES OR
10 PROVIDED THE MATERIALS THAT THEY WERE CONTRACTED TO PERFORM OR PROVIDE;
11 AND

12 2. CERTIFICATION FROM A REPRESENTATIVE OF THE MINORITY OR WOMEN-OWNED
13 BUSINESS THAT THEY IN FACT PERFORMED THE SERVICES OR PROVIDED THE MATE-
14 RIALS THAT THEY WERE CONTRACTED TO PERFORM OR PROVIDE.

15 S 2. Paragraphs (f), (h) and (i) of subdivision 3 of section 311 of
16 the executive law, paragraph (f) as added by chapter 261 of the laws of
17 1988, paragraph (h) as amended and paragraph (i) as added by section 1
18 of part BB of chapter 59 of the laws of 2006, are amended and three new
19 paragraphs (j), (k) and (l) are added to read as follows:

20 (f) to prepare and update periodically a directory of certified minor-
21 ity and women-owned business enterprises which shall, wherever practica-
22 ble, be divided into categories of labor, services, supplies, equipment,
23 materials and recognized construction trades and which shall indicate
24 areas or locations of the state where such enterprises are available to
25 perform services, AND TO USE THIS INFORMATION TO CREATE AN INTERNET

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

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1 BASED, SEARCHABLE, CENTRALIZED STATE REGISTRY DETAILING CERTIFICATIONS,
2 DENIALS, AND ALL DOCUMENTS SUBMITTED DURING THE LIFE OF THE CONTRACT;

3 (h) notwithstanding the provisions of section two hundred ninety-six
4 of this chapter, to file a complaint pursuant to the provisions of
5 section two hundred ninety-seven of this chapter where the director has
6 knowledge that a contractor may have violated the provisions of para-
7 graph (a), (b) or (c) of subdivision one of section two hundred ninety-
8 six of this chapter where such violation is unrelated, separate or
9 distinct from the state contract as expressed by its terms; [and]

10 (i) to streamline the state certification process to accept federal
11 and municipal corporation certifications[.];

12 (J) TO PERFORM INSPECTIONS OF MINORITY OR WOMEN-OWNED BUSINESS'S PLACE
13 OF BUSINESS, WAREHOUSE OR STORAGE FACILITY TO CONFIRM THE EXISTENCE OF A
14 WORKFORCE, EQUIPMENT AND SUPPLIES;

15 (K) TO PERFORM INSPECTIONS OF FINANCIAL RECORDS OF MINORITY OR WOMEN-
16 OWNED BUSINESSES FOR EVIDENCE OF FRAUD; AND

17 (L) TO ENSURE THE PROTECTION OF INDIVIDUALS WHO REPORT WRONGDOING ON
18 THE PART OF A MINORITY OR WOMEN-OWNED BUSINESS.

19 S 3. Section 190.60 of the penal law, as amended by chapter 491 of the
20 laws of 1992, subdivision 1 as amended by chapter 357 of the laws of
21 1996, is amended to read as follows:

22 S 190.60 Scheme to defraud in the [second] FIFTH degree.

23 1. A person is guilty of a scheme to defraud in the [second] FIFTH
24 degree when he engages in a scheme constituting a systematic ongoing
25 course of conduct with intent to defraud more than one person or to
26 obtain property from more than one person by false or fraudulent
27 pretenses, representations or promises, and so obtains property from one
28 or more of such persons.

29 2. In any prosecution under this section, it shall be necessary to
30 prove the identity of at least one person from whom the defendant so
31 obtained property, but it shall not be necessary to prove the identity
32 of any other intended victim.

33 Scheme to defraud in the [second] FIFTH degree is a class A misdemea-
34 nor.

35 S 4. Section 190.65 of the penal law, as amended by chapter 291 of the
36 laws of 2008, is amended to read as follows:

37 S 190.65 Scheme to defraud in the [first] FOURTH degree.

38 1. A person is guilty of a scheme to defraud in the [first] FOURTH
39 degree when he or she: (a) engages in a scheme constituting a systematic
40 ongoing course of conduct with intent to defraud ten or more persons or
41 to obtain property from ten or more persons by false or fraudulent
42 pretenses, representations or promises, and so obtains property from one
43 or more of such persons; or (b) engages in a scheme constituting a
44 systematic ongoing course of conduct with intent to defraud more than
45 one person or to obtain property from more than one person by false or
46 fraudulent pretenses, representations or promises, and so obtains prop-
47 erty with a value in excess of one thousand dollars from one or more
48 such persons; or (c) engages in a scheme constituting a systematic ongo-
49 ing course of conduct with intent to defraud more than one person, more
50 than one of whom is a vulnerable elderly person as defined in subdivi-
51 sion three of section [260.30] 260.31 of this chapter or to obtain prop-
52 erty from more than one person, more than one of whom is a vulnerable
53 elderly person as defined in subdivision three of section [260.30]
54 260.31 of this chapter, by false or fraudulent pretenses, representa-
55 tions or promises, and so obtains property from one or more such
56 persons.

1 2. In any prosecution under this section, it shall be necessary to
2 prove the identity of at least one person from whom the defendant so
3 obtained property, but it shall not be necessary to prove the identity
4 of any other intended victim, provided that in any prosecution under
5 paragraph (c) of subdivision one of this section, it shall be necessary
6 to prove the identity of at least one such vulnerable elderly person as
7 defined in subdivision three of section [260.30] 260.31 of this chapter.

8 Scheme to defraud in the [first] FOURTH degree is a class E felony.

9 S 5. The penal law is amended by adding four new sections 190.66,
10 190.67, 190.68 and 190.69 to read as follows:

11 S 190.66 SCHEME TO DEFRAUD IN THE THIRD DEGREE.

12 1. A PERSON IS GUILTY OF A SCHEME TO DEFRAUD IN THE THIRD DEGREE WHEN
13 HE OR SHE: (A) ENGAGES IN A SCHEME CONSTITUTING A SYSTEMATIC ONGOING
14 COURSE OF CONDUCT WITH INTENT TO DEFRAUD TWENTY-FIVE OR MORE PERSONS OR
15 TO OBTAIN PROPERTY FROM TWENTY-FIVE OR MORE PERSONS BY FALSE OR FRAUDU-
16 LENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS PROPERTY
17 FROM ONE OR MORE OF SUCH PERSONS; OR (B) ENGAGES IN A SCHEME CONSTITUT-
18 ING A SYSTEMATIC ONGOING COURSE OF CONDUCT WITH INTENT TO DEFRAUD MORE
19 THAN ONE PERSON OR TO OBTAIN PROPERTY FROM MORE THAN ONE PERSON BY FALSE
20 OR FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS
21 PROPERTY WITH A VALUE IN EXCESS OF THREE THOUSAND DOLLARS FROM ONE OR
22 MORE SUCH PERSONS.

23 2. IN ANY PROSECUTION UNDER THIS SECTION, IT SHALL BE NECESSARY TO
24 PROVE THE IDENTITY OF AT LEAST ONE PERSON FROM WHOM THE DEFENDANT SO
25 OBTAINED PROPERTY, BUT IT SHALL NOT BE NECESSARY TO PROVE THE IDENTITY
26 OF ANY OTHER INTENDED VICTIM.

27 SCHEME TO DEFRAUD IN THE THIRD DEGREE IS A CLASS D FELONY.

28 S 190.67 SCHEME TO DEFRAUD IN THE SECOND DEGREE.

29 1. A PERSON IS GUILTY OF A SCHEME TO DEFRAUD IN THE SECOND DEGREE WHEN
30 HE OR SHE: (A) ENGAGES IN A SCHEME CONSTITUTING A SYSTEMATIC ONGOING
31 COURSE OF CONDUCT WITH INTENT TO DEFRAUD ONE HUNDRED OR MORE PERSONS OR
32 TO OBTAIN PROPERTY FROM ONE HUNDRED OR MORE PERSONS BY FALSE OR FRAUDU-
33 LENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS PROPERTY
34 FROM ONE OR MORE OF SUCH PERSONS; OR (B) ENGAGES IN A SCHEME CONSTITUT-
35 ING A SYSTEMATIC ONGOING COURSE OF CONDUCT WITH INTENT TO DEFRAUD MORE
36 THAN ONE PERSON OR TO OBTAIN PROPERTY FROM MORE THAN ONE PERSON BY FALSE
37 OR FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS
38 PROPERTY WITH A VALUE IN EXCESS OF FIFTY THOUSAND DOLLARS FROM ONE OR
39 MORE SUCH PERSONS.

40 2. IN ANY PROSECUTION UNDER THIS SECTION, IT SHALL BE NECESSARY TO
41 PROVE THE IDENTITY OF AT LEAST ONE PERSON FROM WHOM THE DEFENDANT SO
42 OBTAINED PROPERTY, BUT IT SHALL NOT BE NECESSARY TO PROVE THE IDENTITY
43 OF ANY OTHER INTENDED VICTIM.

44 SCHEME TO DEFRAUD IN THE SECOND DEGREE IS A CLASS C FELONY.

45 S 190.68 SCHEME TO DEFRAUD IN THE FIRST DEGREE.

46 1. A PERSON IS GUILTY OF A SCHEME TO DEFRAUD IN THE FIRST DEGREE WHEN
47 HE OR SHE: (A) ENGAGES IN A SCHEME CONSTITUTING A SYSTEMATIC ONGOING
48 COURSE OF CONDUCT WITH INTENT TO DEFRAUD ONE THOUSAND OR MORE PERSONS OR
49 TO OBTAIN PROPERTY FROM ONE THOUSAND OR MORE PERSONS BY FALSE OR FRAUDU-
50 LENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS PROPERTY
51 FROM ONE OR MORE OF SUCH PERSONS; OR (B) ENGAGES IN A SCHEME CONSTITUT-
52 ING A SYSTEMATIC ONGOING COURSE OF CONDUCT WITH INTENT TO DEFRAUD MORE
53 THAN ONE PERSON OR TO OBTAIN PROPERTY FROM MORE THAN ONE PERSON BY FALSE
54 OR FRAUDULENT PRETENSES, REPRESENTATIONS OR PROMISES, AND SO OBTAINS
55 PROPERTY WITH A VALUE IN EXCESS OF ONE MILLION DOLLARS FROM ONE OR MORE
56 SUCH PERSONS.

2. IN ANY PROSECUTION UNDER THIS SECTION, IT SHALL BE NECESSARY TO PROVE THE IDENTITY OF AT LEAST ONE PERSON FROM WHOM THE DEFENDANT SO OBTAINED PROPERTY, BUT IT SHALL NOT BE NECESSARY TO PROVE THE IDENTITY OF ANY OTHER INTENDED VICTIM.

SCHEME TO DEFRAUD IN THE FIRST DEGREE IS A CLASS B FELONY.

S 190.69 THREE CONVICTIONS FOR SCHEME TO DEFRAUD BY AN OSTENSIBLE MINORITY OR WOMEN-OWNED BUSINESS.

UPON THREE CONVICTIONS FOR ANY OFFENSE DEFINED IN SECTION 190.60, 190.65, 190.66, 190.67, OR 190.68 INVOLVING A MINORITY OR WOMEN-OWNED BUSINESS, AN INDIVIDUAL SHALL BE BARRED FROM DOING BUSINESS WITH THE STATE.

S 6. Paragraphs a and c of subdivision 1 of section 80.00 of the penal law, as amended by section 27 of subpart A of part H of chapter 55 of the laws of 2014, are amended and a new paragraph d is added to read as follows:

a. [five] FIFTY thousand dollars; or

c. if the conviction is for any felony defined in article two hundred twenty or two hundred twenty-one of this chapter, according to the following schedule:

(i) for A-I felonies, one hundred thousand dollars;

(ii) for A-II felonies, fifty thousand dollars;

(iii) for B felonies, thirty thousand dollars;

(iv) for C felonies, fifteen thousand dollars.

When imposing a fine pursuant to the provisions of this paragraph, the court shall consider the profit gained by defendant's conduct, whether the amount of the fine is disproportionate to the conduct in which defendant engaged, its impact on any victims, and defendant's economic circumstances, including the defendant's ability to pay, the effect of the fine upon his or her immediate family or any other persons to whom the defendant owes an obligation of support[.]; OR

D. IF THE CONVICTION IS FOR ANY FELONY DEFINED IN SECTION 190.65, 190.66, 190.67, OR 190.68, AND THE FRAUD INVOLVES A MINORITY OR WOMEN-OWNED BUSINESS, DOUBLE THE AMOUNT THAT SHOULD HAVE BEEN PAID TO THE MINORITY OR WOMEN-OWNED BUSINESS FOR BONA FIDE WORK OR MATERIALS UNDER THE CONTRACT.

S 7. Section 80.00 of the penal law is amended by adding a new subdivision 8 to read as follows:

8. ALL MONEYS RECEIVED OR COLLECTED IN PAYMENT OF A FINE IMPOSED OUT OF THE MISUSE OF A MINORITY OR WOMEN-OWNED BUSINESS ARE THE PROPERTY OF THE STATE AND THE STATE COMPTROLLER SHALL DEPOSIT ALL SUCH FINES TO THE MINORITY AND WOMEN-OWNED BUSINESS FUND ESTABLISHED PURSUANT TO SECTION NINETY-SEVEN-J OF THE STATE FINANCE LAW.

S 8. Subdivision 4 of section 80.00 of the penal law, as amended by chapter 338 of the laws of 1989, is amended to read as follows:

4. Exception. The provisions of this section shall not apply to a [corporation] NON-NATURAL PERSON.

S 9. Section 80.10 of the penal law, subdivision 1 as amended by section 28 of subpart A of part H of chapter 55 of the laws of 2014, is amended to read as follows:

S 80.10 Fines for [corporations] NON-NATURAL PERSONS.

1. In general. A sentence to pay a fine, when imposed on a [corporation] NON-NATURAL PERSON for an offense defined in this chapter or for an offense defined outside this chapter for which no special [corporate] fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:

1 (a) [Ten] ONE HUNDRED thousand dollars, when the conviction is of a
2 felony;

3 (b) Five thousand dollars, when the conviction is of a class A misde-
4 meanor or of an unclassified misdemeanor for which a term of imprison-
5 ment in excess of three months is authorized;

6 (c) Two thousand dollars, when the conviction is of a class B misde-
7 meanor or of an unclassified misdemeanor for which the authorized term
8 of imprisonment is not in excess of three months;

9 (d) Five hundred dollars, when the conviction is of a violation;

10 (e) Any higher amount not exceeding double the amount of the [corpo-
11 ration's] NON-NATURAL PERSON'S gain from the commission of the offense
12 or, if the [corporation] NON-NATURAL PERSON is convicted of a crime
13 defined in article four hundred ninety-six of this chapter, any higher
14 amount not exceeding three times the amount of the [corporation's] NON-
15 NATURAL PERSON'S gain from the commission of such offense.

16 2. Exception. In the case of an offense defined outside this chapter,
17 if a special fine [for a corporation] is expressly specified in the law
18 or ordinance that defines the offense, the fine fixed by the court shall
19 be as follows:

20 (a) An amount within the limits specified in the law or ordinance that
21 defines the offense; or

22 (b) Any higher amount not exceeding double the amount of the [corpo-
23 ration's] NON-NATURAL PERSON'S gain from the commission of the offense.

24 3. Determination of amount or value. When the court imposes the fine
25 authorized by paragraph (e) of subdivision one or paragraph (b) of
26 subdivision two OF THIS SECTION for any offense the provisions of subdi-
27 vision three of section 80.00 OF THIS ARTICLE shall be applicable to the
28 sentence.

29 S 10. The state finance law is amended by adding a new section 97-j to
30 read as follows:

31 S 97-J. MINORITY AND WOMEN-OWNED BUSINESS FUND. 1. THERE IS HEREBY
32 ESTABLISHED IN THE JOINT CUSTODY OF THE STATE COMPTROLLER AND THE
33 COMMISSIONER OF TAXATION AND FINANCE A SPECIAL FUND TO BE KNOWN AS THE
34 "MINORITY AND WOMEN-OWNED BUSINESS FUND".

35 2. SUCH FUNDS SHALL CONSIST OF ALL FINES RECEIVED FROM ANY COURT OF
36 THE UNIFIED COURT SYSTEM PURSUANT TO THE PROVISIONS OF SUBDIVISION EIGHT
37 OF SECTION 80.00 OF THE PENAL LAW.

38 3. MONIES OF THE FUND, WHEN ALLOCATED, SHALL BE DISBURSED TO ACQUIRE
39 SOFTWARE, EMPLOY PERSONNEL TO AUDIT, INVESTIGATE AND PROSECUTE MINORITY
40 AND WOMEN-OWNED BUSINESS FRAUD AND TO UNDERWRITE MINORITY AND
41 WOMEN-OWNED BUSINESS PROGRAMS TO ASSIST MINORITY AND WOMEN BUSINESS
42 OWNERS TO DEVELOP SUSTAINABLE BUSINESSES.

43 S 11. Section 316 of the executive law, as amended by chapter 175 of
44 the laws of 2010, is amended to read as follows:

45 S 316. Enforcement. 1. Upon receipt by the director of a complaint by
46 a contracting agency that a contractor has violated the provisions of a
47 state contract which have been included to comply with the provisions of
48 this article or of a contractor that a contracting agency has violated
49 such provisions or has failed or refused to issue a waiver where one has
50 been applied for pursuant to subdivision six of section three hundred
51 thirteen of this article or has denied such application, the director
52 shall attempt to resolve the matter giving rise to such complaint. If
53 efforts to resolve such matter to the satisfaction of all parties are
54 unsuccessful, the director shall refer the matter, within thirty days of
55 the receipt of the complaint, to the division's hearing officers. Upon
56 conclusion of the administrative hearing, the hearing officer shall

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

31 2. THE COMPTROLLER SHALL, FROM TIME TO TIME BUT AT LEAST ANNUALLY,
32 CONDUCT AN AUDIT OF EVERY MINORITY AND WOMEN-OWNED BUSINESSES.

33 S 12. This act shall take effect immediately, provided, however, that
34 the amendments to article 15-A of the executive law made by sections
35 one, two and eleven of this act shall not affect the expiration of such
36 article and shall be deemed to expire therewith.