

STATE OF NEW YORK

9629

IN ASSEMBLY

January 26, 2018

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

AN ACT to amend the state finance law, in relation to obligations with
respect to contracts with business enterprises which employ individ-
uals with disabilities

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. The state finance law is amended by adding a new section
2 139-1 to read as follows:

3 § 139-1. Obligations with respect to contracts with qualified business
4 enterprises. 1. Definitions. (a) "Individual with a disability" shall
5 mean a person (i) with a physical, mental or medical impairment of
6 anatomical, physiological or neurological conditions which prevents the
7 exercise of a normal bodily function or is demonstrable by medically
8 accepted clinical or laboratory diagnostic techniques, or (ii) with a
9 record of such an impairment.

10 (b) "Qualified business enterprise" or "certified business enterprise"
11 shall mean any business concern which employs a workforce consisting of
12 at least fifteen percent of employees who are individuals with a disa-
13 bility as defined in this section, which has been certified pursuant to
14 this section.

15 2. Statewide advocate. There is hereby established within the depart-
16 ment of economic development an office of statewide advocate for indi-
17 viduals with disabilities. The statewide advocate shall be appointed by
18 the commissioner of economic development and shall act as a liaison for
19 qualified business enterprises to assist them in obtaining technical,
20 managerial, financial and other business assistance. The advocate shall
21 investigate complaints brought by or on behalf of such enterprises
22 concerning certification delays and instances of violations of law by
23 state agencies. The statewide advocate shall assist certified businesses
24 and applicants in the certification process. Other functions of the
25 statewide advocate shall be directed by the commissioner of economic
26 development. The advocate may appoint staff to assist in his or her
27 duties. The statewide advocate shall establish a toll-free number at the

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

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1 department of economic development to be used to answer questions
2 concerning the certification process.

3 3. Study of qualified business enterprise programs. The commissioner
4 of economic development is authorized and directed to undertake a state-
5 wide disparity study regarding the participation of qualified business
6 enterprises employing individuals with disabilities in state contracts.
7 The study shall be prepared by an entity independent of the department
8 of economic development and selected through a request for proposal
9 process. The purpose of such study is to determine whether there is a
10 disparity between the number of qualified business enterprises ready,
11 willing and able to perform state contracts for commodities, services
12 and construction, and the number of such contractors actually engaged to
13 perform such contracts, and to determine what changes, if any, should be
14 made to state policies affecting these business enterprises. Such study
15 shall include, but not be limited to, a disparity analysis by market
16 area and region of the state. The commissioner of economic development
17 is directed to transmit the disparity study to the governor and the
18 legislature not later than February fifteenth, two thousand eighteen,
19 and to post the study on the website of the department of economic
20 development.

21 4. Opportunities for qualified business enterprises. (a) Each agency
22 shall structure procurement procedures for contracts made directly or
23 indirectly to qualified business enterprises employing individuals with
24 disabilities to attempt to achieve five percent of state contracts
25 awarded to disabled employee business enterprises.

26 (b) The commissioner of economic development shall promulgate rules
27 and regulations pursuant to the goal established in paragraph (a) of
28 this subdivision that provide measures and procedures to ensure that
29 qualified business enterprises under this section shall be given the
30 opportunity for maximum feasible participation in the performance of
31 state contracts and to assist in the agency's identification of those
32 state contracts for which qualified business enterprises may best bid to
33 actively and affirmatively promote and assist their participation in the
34 performance of state contracts so as to facilitate the agency's achieve-
35 ment of the maximum feasible portion of the goals for state contracts to
36 such businesses. Such rules and regulations: shall require a contractor
37 to submit a utilization plan after bids are opened, when bids are
38 required, but prior to the award of a state contract; shall require the
39 contracting agency to review the utilization plan submitted by the
40 contractor and to post the utilization plan and any waivers of compli-
41 ance issued pursuant to paragraph (c) of this subdivision on the website
42 of the contracting agency within a reasonable period of time as estab-
43 lished by the commissioner of economic development; shall require the
44 contracting agency to notify the contractor in writing within a period
45 of time specified by the commissioner of economic development as to any
46 deficiencies contained in the contractor's utilization plan; shall
47 require remedy thereof within a period of time specified by the commis-
48 sioner of economic development; and shall require the contractor to
49 submit periodic compliance reports relating to the operation and imple-
50 mentation of any utilization plan. The rules and regulations promulgated
51 pursuant to this subdivision regarding a utilization plan shall provide
52 that where enterprises have been identified within a utilization plan, a
53 contractor shall attempt, in good faith, to utilize such enterprise at
54 least to the extent indicated. A contracting agency may require a
55 contractor to indicate, within a utilization plan, what measures and
56 procedures he or she intends to take to comply with the provisions of

1 this section, but may not require, as a condition of award of, or
2 compliance with, a contract that a contractor utilize a particular
3 enterprise in performance of the contract. Without limiting other
4 grounds for the disqualification of bids or proposals on the basis of
5 non-responsibility, a contracting agency may disqualify the bid or
6 proposal of a contractor as being non-responsible for failure to remedy
7 notified deficiencies contained in the contractor's utilization plan
8 within a period of time specified in regulations promulgated by the
9 commissioner of economic development after receiving notification of
10 such deficiencies from the contracting agency. Where failure to remedy
11 any notified deficiency in the utilization plan is a ground for disqual-
12 ification, that issue and all other grounds for disqualification shall
13 be stated in writing by the contracting agency.

14 (c) Where it appears that a contractor cannot, after a good faith
15 effort, comply with the qualified business enterprise participation
16 requirements set forth in a particular state contract, a contractor may
17 file a written application with the contracting agency requesting a
18 partial or total waiver of such requirements setting forth the reasons
19 for such contractor's inability to meet any or all of the participation
20 requirements together with an explanation of the efforts undertaken by
21 the contractor to obtain the required disabled employee business enter-
22 prise participation. In implementing the provisions of this section, the
23 contracting agency shall consider the number and types of qualified
24 business enterprises under this section located in the region in which
25 the state contract is to be performed, the total dollar value of the
26 state contract, the scope of work to be performed and the project size
27 and term. If, based on such considerations, the contracting agency
28 determines there is not a reasonable availability of contractors on the
29 list of certified businesses to furnish services for the project, it
30 shall issue a waiver of compliance to the contractor. In making such
31 determination, the contracting agency shall first consider the avail-
32 ability of other business enterprises located in the region and shall
33 thereafter consider the financial ability of businesses located outside
34 the region in which the contract is to be performed to perform the state
35 contract.

36 (d) In the event that a contracting agency fails or refuses to issue a
37 waiver to a contractor as requested within twenty days after having made
38 application therefor pursuant to paragraph (c) of this subdivision or if
39 the contracting agency denies such application, in whole or in part, the
40 contractor may file a complaint with the commissioner of economic devel-
41 opment pursuant to this section setting forth the facts and circum-
42 stances giving rise to the contractor's complaint together with a demand
43 for relief. The contractor shall serve a copy of such complaint upon the
44 contracting agency by personal service or by certified mail, return
45 receipt requested. The contracting agency shall be afforded an opportu-
46 nity to respond to such complaint in writing.

47 (e) If, after the review of a periodic compliance report and after
48 such contractor has been afforded an opportunity to respond to a notice
49 of deficiency issued by the contracting agency in connection therewith,
50 it appears that a contractor is failing or refusing to comply with the
51 qualified business enterprise participation requirements as set forth in
52 the state contract and where no waiver from such requirements has been
53 granted, the contracting agency may file a written complaint with the
54 commissioner of economic development pursuant to this section setting
55 forth the facts and circumstances giving rise to the contracting agen-
56 cy's complaint together with a demand for relief. The contracting agen-

1 cy shall serve a copy of such complaint upon the contractor by personal
2 service or by certified mail, return receipt requested. The contractor
3 shall be afforded an opportunity to respond to such complaint in writ-
4 ing.

5 5. Statewide certification program. (a) The commissioner of economic
6 development shall promulgate rules and regulations providing for the
7 establishment of a statewide certification program for business enter-
8 prises under this section including rules and regulations governing the
9 approval, denial or revocation of any such certification. Such rules and
10 regulations shall include, but not be limited to, such matters as may be
11 required to ensure that the established procedures thereunder shall at
12 least be in compliance with the code of fair procedure set forth in
13 section seventy-three of the civil rights law.

14 (b) For the purposes of this section, the department of economic
15 development shall be responsible for verifying businesses as having a
16 workforce made up of at least fifteen percent of individuals with disa-
17 bilities and for certifying such verified businesses. The commissioner
18 of economic development shall prepare a directory of certified busi-
19 nesses for use by contracting agencies and contractors in carrying out
20 the provisions of this section. The commissioner of economic development
21 shall periodically update the directory.

22 (c) Following application for certification pursuant to this subdivi-
23 sion, the commissioner of economic development shall provide the appli-
24 cant with written notice of the status of the application, including
25 notice of any outstanding deficiencies, within thirty days. Within sixty
26 days of submission of a final completed application, the commissioner of
27 economic development shall provide the applicant with written notice of
28 a determination by the department of economic development approving or
29 denying such certification and, in the event of a denial a statement
30 setting forth the reasons for such denial. Upon a determination denying
31 or revoking certification, the business enterprise for which certif-
32 ication has been so denied or revoked shall, upon written request made
33 within thirty days from receipt of notice of such determination, be
34 entitled to a hearing before an independent hearing officer designated
35 for such purpose by the commissioner of economic development. In the
36 event that a request for a hearing is not made within such thirty day
37 period, such determination shall be deemed to be final. The independent
38 hearing officer shall conduct a hearing and upon the conclusion of such
39 hearing, issue a written recommendation to the commissioner of economic
40 development to affirm, reverse or modify such determination of the
41 commissioner of economic development. Such written recommendation shall
42 be issued to the parties. The commissioner of economic development,
43 within thirty days, by order, must accept, reject or modify such recom-
44 mendation of the hearing officer and set forth in writing the reasons
45 therefor. The commissioner of economic development shall serve a copy of
46 such order and reasons therefor upon the business enterprise by personal
47 service or by certified mail, return receipt requested. The order of the
48 commissioner of economic development shall be subject to review pursuant
49 to article seventy-eight of the civil practice law and rules.

50 (d) All certifications shall be valid for a period of three years.

51 6. Responsibilities of contracting agencies. (a) Each contracting
52 agency shall be responsible for monitoring state contracts under its
53 jurisdiction, and recommending matters to the department of economic
54 development respecting non-compliance with the provisions of this arti-
55 cle so that the office may take such action as is appropriate to insure
56 compliance with the provisions of this section, the rules and regu-

1 lations of the commissioner of economic development issued hereunder and
2 the contractual provisions required pursuant to this section. All
3 contracting agencies shall comply with the rules and regulations of the
4 department of economic development and are directed to cooperate with
5 the department of economic development and to furnish to the department
6 of economic development such information and assistance as may be
7 required in the performance of its functions under this section.

8 (b) Each contracting agency shall provide to prospective bidders a
9 current copy of the directory of certified business enterprises, and a
10 copy of the regulations required pursuant to subdivision four of this
11 section at the time bids or proposals are solicited.

12 (c) Each contracting agency shall report to the department of economic
13 development with respect to activities undertaken to promote employment
14 of individuals with disabilities and promote and increase participation
15 by certified businesses with respect to state contracts and subcon-
16 tracts. Such reports shall be submitted periodically, but not less
17 frequently than annually, as required by the commissioner of economic
18 development, and shall include such information as is necessary for the
19 commissioner of economic development to determine whether the contract-
20 ing agency and contractor have complied with the purposes of this
21 section, including, without limitation, a summary of all waivers of the
22 requirements of subdivision four of this section allowed by the
23 contracting agency during the period covered by the report, including a
24 description of the basis of the waiver request and the rationale for
25 granting any such waiver.

26 (d) Each agency shall include in its annual report to the governor and
27 legislature pursuant to section one hundred sixty-four of the executive
28 law its annual goals for contracts with qualified business enterprises,
29 the number of actual contracts issued to qualified business enterprises;
30 and a summary of all waivers of the requirements of subdivision four of
31 this section allowed by the reporting agency during the preceding year,
32 including a description of the basis of the waiver request and the
33 rationale for granting such waiver.

34 7. Enforcement. Upon receipt by the commissioner of economic develop-
35 ment of a complaint by a contracting agency that a contractor has
36 violated the provisions of a state contract which have been included to
37 comply with the provisions of this section or of a contractor that a
38 contracting agency has violated such provisions or has failed or refused
39 to issue a waiver where one has been applied for pursuant to subdivision
40 four of this section or has denied such application, the commissioner of
41 economic development shall attempt to resolve the matter giving rise to
42 such complaint. If efforts to resolve such matter to the satisfaction of
43 all parties are unsuccessful, the commissioner of economic development
44 shall refer the matter, within thirty days of the receipt of the
45 complaint, to the department of economic development's hearing officers.
46 Upon conclusion of the administrative hearing, the hearing officer shall
47 submit to the commissioner of economic development his or her decision
48 regarding the alleged violation of the contract and recommendations
49 regarding the imposition of sanctions, fines or penalties. The commis-
50 sioner of economic development, within ten days of receipt of the deci-
51 sion, shall file a determination of such matter and shall cause a copy
52 of such determination along with a copy of this article to be served
53 upon the contractor by personal service or by certified mail, return
54 receipt requested. The decision of the hearing officer shall be final
55 and may only be vacated or modified as provided in article seventy-eight
56 of the civil practice law and rules upon an application made within the

1 time provided by such article. The determination of the commissioner of
2 economic development as to the imposition of any fines, sanctions or
3 penalties shall be reviewable pursuant to article seventy-eight of the
4 civil practice law and rules. The penalties imposed for any violation
5 which is premised upon either a fraudulent or intentional misrepresenta-
6 tion by the contractor or the contractor's willful and intentional
7 disregard of the employee participation requirement included in the
8 contract may include a determination that the contractor shall be ineli-
9 gible to submit a bid to any contracting agency or be awarded any such
10 contract for a period not to exceed one year following the final deter-
11 mination; provided however, if a contractor has previously been deter-
12 mined to be ineligible to submit a bid pursuant to this section, the
13 penalties imposed for any subsequent violation, if such violation occurs
14 within five years of the first violation, may include a determination
15 that the contractor shall be ineligible to submit a bid to any contract-
16 ing agency or be awarded any such contract for a period not to exceed
17 five years following the final determination. The department of economic
18 development shall maintain a website listing all contractors that have
19 been deemed ineligible to submit a bid pursuant to this section and the
20 date after which each contractor shall once again become eligible to
21 submit bids.

22 § 2. This act shall take effect on the one hundred eightieth day after
23 it shall have become a law, provided however that the commissioner of
24 economic development is authorized to promulgate any and all rules and
25 regulations and take any other measures necessary to implement this act
26 on its effective date.