STATE OF NEW YORK

1518

2019-2020 Regular Sessions

IN ASSEMBLY

January 15, 2019

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 individuals with disabilities

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

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

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

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

2. Statewide advocate. There is hereby established within the department of economic development an office of statewide advocate for individuals with disabilities. The statewide advocate shall be appointed by the commissioner of economic development and shall act as a liaison for qualified business enterprises to assist them in obtaining technical, managerial, financial and other business assistance. The advocate shall investigate complaints brought by or on behalf of such enterprises concerning certification delays and instances of violations of law by state agencies. The statewide advocate shall assist certified businesses and applicants in the certification process. Other functions of the

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

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statewide advocate shall be directed by the commissioner of economic development. The advocate may appoint staff to assist in his or her duties. The statewide advocate shall establish a toll-free number at the department of economic development to be used to answer questions concerning the certification process.

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

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

(b) The commissioner of economic development shall promulgate rules and regulations pursuant to the goal established in paragraph (a) of this subdivision that provide measures and procedures to ensure that qualified business enterprises under this section shall be given the opportunity for maximum feasible participation in the performance of state contracts and to assist in the agency's identification of those state contracts for which qualified business enterprises may best bid to actively and affirmatively promote and assist their participation in the performance of state contracts so as to facilitate the agency's achieve-ment of the maximum feasible portion of the goals for state contracts to such businesses. Such rules and regulations: shall require a contractor to submit a utilization plan after bids are opened, when bids are required, but prior to the award of a state contract; shall require the contracting agency to review the utilization plan submitted by the contractor and to post the utilization plan and any waivers of compli-ance issued pursuant to paragraph (c) of this subdivision on the website of the contracting agency within a reasonable period of time as estab-lished by the commissioner of economic development; shall require the contracting agency to notify the contractor in writing within a period of time specified by the commissioner of economic development as to any deficiencies contained in the contractor's utilization plan; shall require remedy thereof within a period of time specified by the commis-sioner of economic development; and shall require the contractor to submit periodic compliance reports relating to the operation and imple-mentation of any utilization plan. The rules and regulations promulgated pursuant to this subdivision regarding a utilization plan shall provide that where enterprises have been identified within a utilization plan, a contractor shall attempt, in good faith, to utilize such enterprise at

least to the extent indicated. A contracting agency may require a contractor to indicate, within a utilization plan, what measures and procedures he or she intends to take to comply with the provisions of this section, but may not require, as a condition of award of, or compliance with, a contract that a contractor utilize a particular enterprise in performance of the contract. Without limiting other grounds for the disqualification of bids or proposals on the basis of non-responsibility, a contracting agency may disqualify the bid or proposal of a contractor as being non-responsible for failure to remedy notified deficiencies contained in the contractor's utilization plan within a period of time specified in regulations promulgated by the commissioner of economic development after receiving notification of such deficiencies from the contracting agency. Where failure to remedy any notified deficiency in the utilization plan is a ground for disqualification, that issue and all other grounds for disqualification shall be stated in writing by the contracting agency.

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

(d) In the event that a contracting agency fails or refuses to issue a waiver to a contractor as requested within twenty days after having made application therefor pursuant to paragraph (c) of this subdivision or if the contracting agency denies such application, in whole or in part, the contractor may file a complaint with the commissioner of economic development pursuant to this section setting forth the facts and circumstances giving rise to the contractor's complaint together with a demand for relief. The contractor shall serve a copy of such complaint upon the contracting agency by personal service or by certified mail, return receipt requested. The contracting agency shall be afforded an opportunity to respond to such complaint in writing.

(e) If, after the review of a periodic compliance report and after such contractor has been afforded an opportunity to respond to a notice of deficiency issued by the contracting agency in connection therewith, it appears that a contractor is failing or refusing to comply with the qualified business enterprise participation requirements as set forth in the state contract and where no waiver from such requirements has been granted, the contracting agency may file a written complaint with the

commissioner of economic development pursuant to this section setting forth the facts and circumstances giving rise to the contracting agency's complaint together with a demand for relief. The contracting agency shall serve a copy of such complaint upon the contractor by personal service or by certified mail, return receipt requested. The contractor shall be afforded an opportunity to respond to such complaint in writing.

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

(b) For the purposes of this section, the department of economic development shall be responsible for verifying businesses as having a workforce made up of at least fifteen percent of individuals with disabilities and for certifying such verified businesses. The commissioner of economic development shall prepare a directory of certified businesses for use by contracting agencies and contractors in carrying out the provisions of this section. The commissioner of economic development shall periodically update the directory.

(c) Following application for certification pursuant to this subdivision, the commissioner of economic development shall provide the applicant with written notice of the status of the application, including notice of any outstanding deficiencies, within thirty days. Within sixty days of submission of a final completed application, the commissioner of economic development shall provide the applicant with written notice of a determination by the department of economic development approving or denying such certification and, in the event of a denial a statement setting forth the reasons for such denial. Upon a determination denying or revoking certification, the business enterprise for which certification has been so denied or revoked shall, upon written request made within thirty days from receipt of notice of such determination, be entitled to a hearing before an independent hearing officer designated for such purpose by the commissioner of economic development. In the event that a request for a hearing is not made within such thirty day period, such determination shall be deemed to be final. The independent hearing officer shall conduct a hearing and upon the conclusion of such hearing, issue a written recommendation to the commissioner of economic development to affirm, reverse or modify such determination of the commissioner of economic development. Such written recommendation shall be issued to the parties. The commissioner of economic development, within thirty days, by order, must accept, reject or modify such recommendation of the hearing officer and set forth in writing the reasons therefor. The commissioner of economic development shall serve a copy of such order and reasons therefor upon the business enterprise by personal service or by certified mail, return receipt requested. The order of the commissioner of economic development shall be subject to review pursuant to article seventy-eight of the civil practice law and rules.

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

6. Responsibilities of contracting agencies. (a) Each contracting agency shall be responsible for monitoring state contracts under its jurisdiction, and recommending matters to the department of economic

development respecting non-compliance with the provisions of this article so that the office may take such action as is appropriate to insure compliance with the provisions of this section, the rules and regulations of the commissioner of economic development issued hereunder and the contractual provisions required pursuant to this section. All contracting agencies shall comply with the rules and regulations of the department of economic development and are directed to cooperate with the department of economic development and to furnish to the department of economic development such information and assistance as may be required in the performance of its functions under this section.

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

(c) Each contracting agency shall report to the department of economic development with respect to activities undertaken to promote employment of individuals with disabilities 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 commissioner of economic development, and shall include such information as is necessary for the commissioner of economic development to determine whether the contracting agency and contractor have complied with the purposes of this section, including, without limitation, a summary of all waivers of the requirements of subdivision four of this section 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.

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

7. Enforcement. Upon receipt by the commissioner of economic development of a complaint by a contracting agency that a contractor has violated the provisions of a state contract which have been included to comply with the provisions of this section or of a contractor 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 four of this section or has denied such application, the commissioner of economic development 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 commissioner of economic development shall refer the matter, within thirty days of the receipt of the complaint, to the department of economic development's hearing officers. Upon conclusion of the administrative hearing, the hearing officer shall submit to the commissioner of economic development his or her decision regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The commissioner of economic development, 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 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 commissioner of economic development 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 the contractor's willful and intentional disregard of the employee participation requirement included in the contract may include a determination that the contractor 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 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 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 department of economic development shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

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