

STATE OF NEW YORK

6046

2019-2020 Regular Sessions

IN SENATE

May 16, 2019

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

AN ACT to amend the executive law, in relation to the minority and women-owned business enterprise program; to amend chapter 261 of the laws of 1988, amending the state finance law and other laws relating to the New York state infrastructure trust fund, in relation to the effectiveness thereof; to amend the executive law, in relation to goals and requirements of contractors and agencies under the minority and women-owned business enterprise program; and to amend the executive law, in relation to reporting requirements under the minority and women-owned business enterprise program

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

1 Section 1. Paragraph (b) of subdivision 8 and subdivisions 21 and 22
2 of section 310 of the executive law, paragraph (b) of subdivision 8 as
3 added by chapter 261 of the laws of 1988 and subdivisions 21 and 22 as
4 added by chapter 175 of the laws of 2010, are amended to read as
5 follows:

6 (b) [~~Hispanic~~] Hispanic/Latino persons of Mexican, Puerto Rican,
7 Dominican, Cuban, Central or South American of either Indian or Hispanic
8 origin, regardless of race;

9 21. "The [~~2010~~] two thousand sixteen disparity study" shall refer to
10 the disparity study commissioned by the [~~empire state development corpo-~~
11 ~~ration~~] department of economic development, pursuant to section three
12 hundred twelve-a of this article, and published on [~~April twenty-nine,~~
13 ~~two thousand ten~~] June thirtieth, two thousand seventeen.

14 22. "Diversity practices" shall mean the contractor's practices and
15 policies with respect to:

16 (a) [~~utilizing~~] mentoring certified minority and women-owned business
17 enterprises in contracts awarded by a state agency or other public
18 corporation, as subcontractors and suppliers; [~~and~~]

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

LBD11788-02-9

(b) entering into partnerships, joint ventures or other similar arrangements with certified minority and women-owned business enterprises as defined in this article or other applicable statute or regulation governing an entity's utilization of minority or women-owned business enterprises; and

(c) the representation of minority group members and women as members of the board of directors or executive officers of the contractor.

§ 2. Section 312-a of the executive law, as amended by section 1 of part Q of chapter 58 of the laws of 2015, is amended to read as follows:

§ 312-a. Study of minority and women-owned business ~~[enterprise programs]~~ enterprises. 1. The director of the division of minority and women-owned business development ~~[in the department of economic development]~~ is authorized and directed to recommission a statewide disparity study regarding the participation of minority and women-owned business enterprises in state contracts since the amendment of this article to be delivered to the governor and legislature no later than August fifteenth, two thousand ~~[sixteen]~~ twenty-three. The study shall be prepared by an entity independent of the department and selected through a request for proposal process. The purpose of such study is:

(a) to determine whether there is a disparity between the number of qualified minority and women-owned businesses 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 minority and women-owned business enterprises; and (b) to determine whether there is a disparity between the number of qualified minorities and women ready, willing and able, with respect to labor markets, qualifications and other relevant factors, to participate in contractor employment, management level bodies, including boards of directors, and as senior executive officers within contracting entities and the number of such group members actually employed or affiliated with state contractors in the aforementioned capacities, and to determine what changes, if any, should be made to state policies affecting minority and women group populations with regard to state contractors' employment and appointment practices relative to diverse group members. Such study shall include, but not be limited to, an analysis of the history of minority and women-owned business enterprise programs and their effectiveness as a means of securing and ensuring participation by minorities and women, and a disparity analysis by market area and region of the state. Such study shall distinguish between minority males, minority females and non-minority females in the statistical analysis.

2. The director of the division of minority and women-owned business development is directed to transmit the disparity study to the governor and the legislature not later than August fifteenth, two thousand ~~[sixteen]~~ twenty-three, and to post the study on the website of the department of economic development.

§ 3. The opening paragraph of subdivision (h) of section 121 of chapter 261 of the laws of 1988, amending the state finance law and other laws relating to the New York state infrastructure trust fund, as amended by section 1 of part 000 of chapter 59 of the laws of 2018, is amended to read as follows:

The provisions of sections sixty-two through sixty-six of this act shall expire April fifteenth, two thousand twenty-four, provided, however, that if the statewide disparity study regarding the participation of minority and women-owned business enterprises in state contracts required pursuant to subdivision 1 of section 312-a of the executive law

1 is completed and delivered to the governor and the legislature on or
2 before August fifteenth two thousand twenty-three, then the provisions
3 of sections sixty-two through sixty-six of this act shall expire and be
4 deemed repealed on December thirty-first, two thousand [~~nineteen~~] twen-
5 ty-four, except that:

6 § 4. Subdivisions 1, 1-a, 1-b, 2, 2-a, 3, 4 and 5 of section 313 of
7 the executive law, subdivisions 1, 3, 4 and 5 as amended and subdivi-
8 sions 1-a, 1-b, 2 and 2-a as added by chapter 175 of the laws of 2010,
9 are amended and a new subdivision 1-c is added to read as follows:

10 1. Goals and requirements for agencies and contractors. Each agency
11 shall structure procurement procedures for contracts made directly or
12 indirectly to minority and women-owned business enterprises, in accord-
13 ance with the findings of the two thousand [~~ten~~] sixteen disparity
14 study, consistent with the purposes of this article, to attempt to
15 achieve the [~~following~~] recommended results with regard to total annual
16 statewide procurement for each of the following:

17 (a) construction industry for certified minority-owned business enter-
18 prises[~~+ fourteen and thirty-four hundredths percent~~];

19 (b) construction industry for certified women-owned business enter-
20 prises[~~+ eight and forty-one hundredths percent~~];

21 (c) construction related professional services industry for certified
22 minority-owned business enterprises[~~+ thirteen and twenty-one hundredths~~
23 ~~percent~~];

24 (d) construction related professional services industry for certified
25 women-owned business enterprises[~~+ eleven and thirty-two hundredths~~
26 ~~percent~~];

27 (e) non-construction related services industry for certified minori-
28 ty-owned business enterprises[~~+ nineteen and sixty hundredths percent~~];

29 (f) non-construction related services industry for certified women-
30 owned business enterprises[~~+ seventeen and forty-four hundredths~~
31 ~~percent~~];

32 (g) commodities industry for certified minority-owned business enter-
33 prises[~~+ sixteen and eleven hundredths percent~~];

34 (h) commodities industry for certified women-owned business enter-
35 prises[~~+ ten and ninety-three hundredths percent~~];

36 (i) overall agency total dollar value of procurement for certified
37 minority-owned business enterprises[~~+ sixteen and fifty-three hundredths~~
38 ~~percent~~];

39 (j) overall agency total dollar value of procurement for certified
40 women-owned business enterprises[~~+ twelve and thirty-nine hundredths~~
41 ~~percent~~]; and

42 (k) overall agency total dollar value of procurement for certified
43 minority, women-owned business enterprises[~~+ twenty-eight and ninety-two~~
44 ~~hundredths percent~~].

45 1-a. The director shall ensure that each state agency has been
46 provided with a copy of the two thousand [~~ten~~] sixteen disparity study.

47 1-b. Each agency shall develop and adopt agency-specific goals based
48 on the findings of the two thousand [~~ten~~] sixteen disparity study.

49 1-c. The goals set pursuant to subdivision one of this section shall
50 be consistent with the findings of the two thousand sixteen disparity
51 study.

52 2. The director shall promulgate rules and regulations pursuant to the
53 goals established in subdivision one of this section and findings of the
54 two thousand sixteen disparity study that provide measures and proce-
55 dures to ensure that certified minority and women-owned businesses shall
56 be given the opportunity for maximum feasible participation in the

1 performance of state contracts and to assist in the agency's identifica-
2 tion of those state contracts for which minority and women-owned certi-
3 fied businesses may best bid to actively and affirmatively promote and
4 assist their participation in the performance of state contracts so as
5 to facilitate the agency's achievement of the maximum feasible portion
6 of the goals for state contracts to such businesses.

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 (iii) the findings of the two thousand sixteen disparity study;

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

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

27 (e) establish criteria for agencies to credit the participation of
28 minority and women-owned business enterprises towards the achievement of
29 the minority and women-owned business enterprise participation goals on
30 a state contract based on the commercially useful function provided by
31 each minority and women-owned business enterprise on the contract;

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

34 [~~(f)~~] (g) consistent with subdivision six of this section, provide for
35 circumstances under which an agency may waive obligations of the
36 contractor relating to minority and women-owned business enterprise
37 participation;

38 [~~(g)~~] (h) require that an agency verify that minority and women-owned
39 business enterprises listed in a successful bid are actually participat-
40 ing to the extent listed in the project for which the bid was submitted;

41 [~~(h)~~] (i) provide for the collection of statistical data by each agen-
42 cy concerning actual minority and women-owned business enterprise
43 participation; and

44 [~~(i)~~] (j) require each agency to consult the most current disparity
45 study when calculating agency-wide and contract specific participation
46 goals pursuant to this article.

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

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

23 4. In the implementation of this section, the contracting agency shall
24 (a) consult the findings contained within the disparity study evidencing
25 relevant industry specific availability of certified businesses;

26 (b) implement a program that will enable the agency to evaluate each
27 contract to determine the ~~[appropriateness of the]~~ appropriate goal
28 pursuant to subdivision one of this section for participation by minori-
29 ty-owned business enterprises and women-owned business enterprises;

30 (c) consider where practicable, the severability of construction
31 projects and other bundled contracts; and

32 (d) consider compliance with the requirements of any federal law
33 concerning opportunities for minority and women-owned business enter-
34 prises which effectuates the purpose of this section. The contracting
35 agency shall determine whether the imposition of the requirements of any
36 such law duplicate or conflict with the provisions hereof and if such
37 duplication or conflict exists, the contracting agency shall waive the
38 applicability of this section to the extent of such duplication or
39 conflict.

40 5. (a) Contracting agencies shall administer the rules and regulations
41 promulgated by the director in a good faith effort to meet the maximum
42 feasible portion of the agency's goals adopted pursuant to this article
43 and the regulations of the director. Such rules and regulations: shall
44 require a contractor to submit a utilization plan after bids are opened,
45 when bids are required, but prior to the award of a state contract;
46 shall require the contracting agency to review the utilization plan
47 submitted by the contractor and to post the utilization plan and any
48 waivers of compliance issued pursuant to subdivision six of this section
49 on the website of the contracting agency ~~[within a reasonable period of~~
50 ~~time as established by the director]~~; shall require the contracting
51 agency to notify the contractor in writing within a period of time spec-
52 ified by the director as to any deficiencies contained in the contrac-
53 tor's utilization plan; shall require remedy thereof within a period of
54 time specified by the director; shall require the contractor to submit
55 periodic compliance reports relating to the operation and implementation
56 of any utilization plan; shall not allow any automatic waivers but shall

1 allow a contractor to apply for a partial or total waiver of the minori-
2 ty and women-owned business enterprise participation requirements pursu-
3 ant to subdivisions six and seven of this section; shall allow a
4 contractor to file a complaint with the director pursuant to subdivision
5 eight of this section in the event a contracting agency has failed or
6 refused to issue a waiver of the minority and women-owned business
7 enterprise participation requirements or has denied such request for a
8 waiver; and shall allow a contracting agency to file a complaint with
9 the director pursuant to subdivision nine of this section in the event a
10 contractor is failing or has failed to comply with the minority and
11 women-owned business enterprise participation requirements set forth in
12 the state contract where no waiver has been granted.

13 (b) The rules and regulations promulgated pursuant to this subdivision
14 regarding a utilization plan shall provide that where enterprises have
15 been identified within a utilization plan, a contractor shall attempt,
16 in good faith, to utilize such enterprise at least to the extent indi-
17 cated. A contracting agency may require a contractor to indicate, within
18 a utilization plan, what measures and procedures he or she intends to
19 take to comply with the provisions of this article, but may not require,
20 as a condition of award of, or compliance with, a contract that a
21 contractor utilize a particular enterprise in performance of the
22 contract.

23 (c) Without limiting other grounds for the disqualification of bids or
24 proposals on the basis of non-responsibility, a contracting agency may
25 disqualify the bid or proposal of a contractor as being non-responsible
26 for failure to remedy notified deficiencies contained in the contrac-
27 tor's utilization plan within a period of time specified in regulations
28 promulgated by the director after receiving notification of such defi-
29 ciencies from the contracting agency. Where failure to remedy any noti-
30 fied deficiency in the utilization plan is a ground for disqualifica-
31 tion, that issue and all other grounds for disqualification shall be
32 stated in writing by the contracting agency. Where the contracting agen-
33 cy states that a failure to remedy any notified deficiency in the utili-
34 zation plan is a ground for disqualification the contractor shall be
35 entitled to an administrative hearing, on a record, involving all
36 grounds stated by the contracting agency. Such hearing shall be
37 conducted by the appropriate authority of the contracting agency to
38 review the determination of disqualification. A final administrative
39 determination made following such hearing shall be reviewable in a
40 proceeding commenced under article seventy-eight of the civil practice
41 law and rules, provided that such proceeding is commenced within thirty
42 days of the notice given by certified mail return receipt requested
43 rendering such final administrative determination. Such proceeding shall
44 be commenced in the supreme court, appellate division, third department
45 and such proceeding shall be preferred over all other civil causes
46 except election causes, and shall be heard and determined in preference
47 to all other civil business pending therein, except election matters,
48 irrespective of position on the calendar. Appeals taken to the court of
49 appeals of the state of New York shall be subject to the same prefer-
50 ence.

51 § 5. Section 315 of the executive law, as added by chapter 261 of the
52 laws of 1988, subdivision 3 as amended and subdivisions 4, 5, 6 and 7 as
53 added by chapter 175 of the laws of 2010, is amended to read as follows:

54 § 315. Responsibilities of contracting agencies. 1. Each contracting
55 agency shall be responsible for monitoring state contracts under its
56 jurisdiction, and recommending matters to the office respecting non-com-

1 pliance with the provisions of this article so that the office may take
2 such action as is appropriate to [~~insure~~] ensure compliance with the
3 provisions of this article, the rules and regulations of the director
4 issued hereunder and the contractual provisions required pursuant to
5 this article. All contracting agencies shall comply with the rules and
6 regulations of the office and are directed to cooperate with the office
7 and to furnish to the office such information and assistance as may be
8 required in the performance of its functions under this article.

9 2. Each contracting agency shall provide to prospective bidders a
10 current copy of the directory of certified businesses, and a copy of the
11 regulations required pursuant to sections three hundred twelve and three
12 hundred thirteen of this article at the time bids or proposals are
13 solicited.

14 2-a. Each contracting agency when notifying a contractor of a winning
15 bid award shall also notify any minority or women-owned business enter-
16 prises affiliated with such contractor, per the contractor's submitted
17 utilization plan, of such contractor's receipt of the winning bid award.

18 3. Each contracting agency shall report to the director with respect
19 to activities undertaken to promote employment of minority group members
20 and women and promote and increase participation by certified businesses
21 with respect to state contracts and subcontracts. Such reports shall be
22 submitted [~~periodically, but not less frequently than annually, as~~
23 ~~required by the director,~~] no later than January fifteenth of every year
24 and shall include such information as is necessary for the director to
25 determine whether the contracting agency and any contractor to the
26 contracting agency have complied with the purposes of this article,
27 including, without limitation, a summary of all waivers of the require-
28 ments of subdivisions six and seven of section three hundred thirteen of
29 this article allowed by the contracting agency during the period covered
30 by the report, including a description of the basis of the waiver
31 request [~~and~~], the rationale for granting any such waiver and any
32 instances in which the contracting agency has deemed a contractor to
33 have committed a violation pursuant to section three hundred sixteen of
34 this article and such other information as the director shall require.
35 Each agency shall also include in such annual report whether or not it
36 has been required to prepare a remedial plan, and, if so, the plan and
37 the extent to which the agency has complied with each element of the
38 plan.

39 4. The division of minority and women's business development shall
40 issue an annual report which: (a) summarizes the report submitted by
41 each contracting agency pursuant to subdivision three of this section;
42 (b) contains such comparative or other information as the director deems
43 appropriate, including but not limited to goals compared to actual
44 participation of minority and women-owned business enterprises in state
45 contracting and a listing of annual goals compared to actual partic-
46 ipation for each agency, the total number of certified minority and
47 women-owned businesses for that reporting year as well as the total
48 number reported in each of the previous five years, and the total dollar
49 value of state expenditures on certified minority and women-owned busi-
50 ness contracts and subcontracts for the previous five years, to evaluate
51 the effectiveness of the activities undertaken by each such contracting
52 agency to promote increased participation by certified minority or
53 women-owned businesses with respect to state contracts and subcontracts;
54 (c) contains a summary of all waivers of the requirements of subdivi-
55 sions six and seven of section three hundred thirteen of this article
56 allowed by each contracting agency during the period covered by the

1 report, including a description of the basis of the waiver request and
2 the contracting agency's rationale for granting any such waiver; (d)
3 describes any efforts to create a database or other information storage
4 and retrieval system containing information relevant to contracting with
5 minority and women-owned business enterprises; ~~and~~ (e) contains a
6 summary of (i) all determinations of violations of this article by a
7 contractor or a contracting agency made during the period covered by the
8 annual report pursuant to section three hundred sixteen-a of this arti-
9 cle and (ii) the penalties or sanctions, if any, assessed in connection
10 with such determinations and the rationale for such penalties or sanc-
11 tions; (f) provides a written rationale for instances where an agency's
12 participation goals or remedial plans do not meet the goals supported by
13 the two thousand sixteen disparity study; (g) provides a written expla-
14 nation of the reason that agency expenditures are exempt from complying
15 with participation goals; (h) contains information on each contract
16 identifying the following: (i) whether it is a contract for goods or
17 services; (ii) whether the contract was awarded to a certified minori-
18 ty-owned business enterprise or a certified women-owned business enter-
19 prise and identify which minority group member the minority-owned busi-
20 ness enterprise relies on for certification pursuant to this article;
21 (iii) the name and business address of prime contractors and subcontrac-
22 tors providing services under such contract; and (iv) the dollar value
23 of such contract; and (i) contains a summary of all certified minority
24 and women-owned business enterprises, categorized by the minority group
25 member that such minority-owned business enterprise relies on for
26 certification pursuant to this article and by gender. Copies of the
27 annual report shall be provided to the commissioner, the governor, the
28 comptroller, the temporary president of the senate, the speaker of the
29 assembly, the minority leader of the senate, the minority leader of the
30 assembly and shall also be made widely available to the public via,
31 among other things, publication on a website maintained by the division
32 of minority and women's business development.

33 5. Each agency shall include in its annual report to the governor and
34 legislature pursuant to section one hundred sixty-four of ~~[the executive~~
35 ~~law]~~ this chapter: (a) its annual goals for contracts with minority-
36 owned and women-owned business enterprises~~;~~; (b) the number of actual
37 contracts issued to minority-owned and women-owned business enterprises;
38 ~~and~~ (c) a summary of all waivers of the requirements of subdivisions
39 six and seven of section three hundred thirteen of this article allowed
40 by the reporting agency during the preceding year, including a
41 description of the basis of the waiver request and the rationale for
42 granting such waiver~~[- Each agency shall also include in such annual~~
43 ~~report];~~ (d) whether or not it has been required to prepare a remedial
44 plan, and, if so, the plan and the extent to which the agency has
45 complied with each element of the plan; and (e) which expenditures are
46 exempt from participation goals and the rationale for such exemption.
47 Such report shall also itemize the total value of design-build contracts
48 used by each contracting agency when applicable, and each contracting
49 agency authorized to enter into design-build contracts shall itemize the
50 rate of minority and women-owned business enterprises participation on
51 design-build contracts, design-bid-build contracts, as well as the agen-
52 cy's overall participation rate.

53 6. Each contracting agency that substantially fails to meet the goals
54 supported by the disparity study, as defined by regulation of the direc-
55 tor, shall be required to submit to the director a remedial action plan
56 to remedy such failure.

1 7. If it is determined by the director that any agency has failed to
2 act in good faith to implement the remedial action plan, pursuant to
3 subdivision six of this section within one year, the director shall
4 provide written notice of such a finding, which shall be publicly avail-
5 able, and direct implementation of remedial actions to:

6 (a) assure that sufficient and effective solicitation efforts to women
7 and minority-owned business enterprises are being made by said agency;

8 (b) divide contract requirements, when economically feasible, into
9 quantities that will expand the participation of women and minority-
10 owned business enterprises;

11 (c) eliminate extended experience or capitalization requirements, when
12 programmatically and economically feasible, that will expand partic-
13 ipation by women and minority-owned business enterprises;

14 (d) identify specific proposed contracts as particularly attractive or
15 appropriate for participation by women and minority-owned business
16 enterprises with such identification to result from and be coupled with
17 the efforts of paragraphs (a), (b), and (c) of this subdivision; and

18 (e) upon a finding by the director that an agency has failed to take
19 affirmative measures to implement the remedial plan and to follow any of
20 the remedial actions set forth by the director, and in the absence of
21 any objective progress towards the agency's goals, require some or all
22 of the agency's procurement, for a specified period of time, be placed
23 under the direction and control of another agency or agencies.

24 § 6. This act shall take effect immediately; provided, however, that
25 the amendments to sections 310, 312-a, 313 and 315 of the executive law
26 made by sections one, two, four and five of this act shall be not affect
27 the expiration of such sections and shall expire and be deemed repealed
28 therewith.