

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:

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

3 § 139-m. 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

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

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

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

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

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

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

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

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

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

1 commissioner of economic development pursuant to this section setting
2 forth the facts and circumstances giving rise to the contracting agen-
3 cy's complaint together with a demand for relief. The contracting agen-
4 cy shall serve a copy of such complaint upon the contractor by personal
5 service or by certified mail, return receipt requested. The contractor
6 shall be afforded an opportunity to respond to such complaint in writ-
7 ing.

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

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

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

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

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

1 development respecting non-compliance with the provisions of this arti-
2 cle so that the office may take such action as is appropriate to insure
3 compliance with the provisions of this section, the rules and regu-
4 lations of the commissioner of economic development issued hereunder and
5 the contractual provisions required pursuant to this section. All
6 contracting agencies shall comply with the rules and regulations of the
7 department of economic development and are directed to cooperate with
8 the department of economic development and to furnish to the department
9 of economic development such information and assistance as may be
10 required in the performance of its functions under this section.

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

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

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

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

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

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