STATE OF NEW YORK

7519--A

2021-2022 Regular Sessions

IN ASSEMBLY

May 13, 2021

Introduced by M. of A. BICHOTTE HERMELYN, SIMON, FERNANDEZ, ZINERMAN, SEAWRIGHT, JACKSON -- read once and referred to the Committee on Governmental Operations -- recommitted to the Committee on Governmental Operations in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the executive law, in relation to participation by minority group members and women with respect to certain state contracts; and to amend the state finance law, in relation to performance and payment bond requirements

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

Section 1. Subdivisions 3 and 4 of section 311 of the executive law, subdivision 3 as added by chapter 261 of the laws of 1988, paragraphs (d) and (e) of subdivision 3 as amended by chapter 55 of the laws of 1992, paragraph (f) of subdivision 3 and the opening paragraph of subdivision 4 as amended and paragraph (d-1) of subdivision 3 and paragraphs (d) and (e) of subdivision 4 as added by chapter 96 of the laws of 2019, paragraph (g) of subdivision 3 as amended by section 1 of part BB of chapter 59 of the laws of 2006, paragraphs (h), (i) and (j) of subdivision 3 as amended and paragraph (k) of subdivision 3 as added by chapter 825 of the laws of 2021, and subdivision 4 as amended by chapter 361 of the laws of 2009, are amended to read as follows:

3. The director shall have the following powers and duties:

(a) to encourage and assist contracting agencies in their efforts to increase participation by minority and women-owned business enterprises on state contracts and subcontracts [~~so as~~] to facilitate the award of a fair share of such contracts to them **and to provide on the division's website a list of each contracting agency's minority and women-owned business enterprises certification outreach seminars**;

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

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(b) to develop standardized forms and reporting documents necessary to implement this article;

(c) to conduct educational **outreach** programs **to encourage the certification of minority and women-owned business enterprises** consistent with the purposes of this article;

(d) to review [~~periodically~~] **quarterly** the practices and procedures of each contracting agency with respect to compliance with the provisions of this article, and to require them to file [~~periodic~~] **quarterly** reports with the division of minority and women's business development as to the level of minority and women-owned business enterprises participation in the awarding of agency contracts for goods and services **including but not limited to the number of state contracts awarded to certified minority or women-owned business enterprises, the maximum dollar amount obligated pursuant to all those contracts, and the total expenditures made pursuant to all such contracts; the number of state contracts awarded which include a utilization plan for business participation by certified minority or women-owned business enterprises, the maximum amount obligated pursuant to those contracts, and the total expenditures made pursuant to all such contracts; the number of state contracts awarded upon which a waiver was granted from goals required by the contracts for business participation by certified minority or women-owned business enterprises, and the maximum amount obligated pursuant to those contracts; the number of state contracts awarded which required goals for employment of minority group members and women; and the number of state contracts awarded for which waivers of employment goals required by the contracts have been granted**;

(d-1) to require all contracting state agencies to develop a four-year growth plan to determine a means of promoting and increasing participation by minority-owned and women-owned business enterprises with respect to state contracts and subcontracts. Every four years, beginning September fifteenth, two thousand twenty, each contracting state agency shall submit a four-year growth plan as part of its annual report to the governor and legislature pursuant to section one hundred sixty-four of this chapter.

(e) on January first of each year report to the governor**, the temporary president of the senate, the speaker of the assembly, the minority leaders of the senate and the assembly,** and the chairpersons of the senate finance and assembly ways and means committees on the [~~level~~] **actual versus projected levels** of minority and women-owned business enterprises participating in each agency's contracts for goods [~~and~~]**,** services **and construction, including but not limited to the number of state contracts awarded to certified minority-owned or women-owned business enterprises, the maximum dollar amount obligated pursuant to all those contracts, and the total expenditures made pursuant to all such contracts,** and on activities of the office and effort by each contracting agency to promote employment of minority group members and women, and to promote and increase participation by certified businesses with respect to state contracts and subcontracts so as to facilitate the award of a fair share of state contracts to such businesses. The comptroller shall assist the division in collecting information on the participation of certified business for each contracting agency. Such report may recommend new activities and programs to effectuate the purposes of this article;

(f) **the director shall list in the division's annual report the names of non-compliant agencies and the extent of their noncompliance in submitting its quarterly minority and women-owned business enterprise**

utilization reports; and, shall implement a master list of all the state agencies required to file quarterly compliance reports and shall attach such list to the division's annual report.

(g) to prepare and update[~~, no less than annually,~~] **quarterly** a directory of certified minority and women-owned business enterprises which shall, wherever practicable, be divided into categories of labor, services, supplies, equipment, materials and recognized construction trades and which shall indicate areas or locations of the state where such enterprises are available to perform services**, and to use this information to create an internet based, centralized state registry to enable appropriate state certified minority and women-owned business enterprises to access contract and subcontract opportunities**;

[~~(g)~~] **(h)** to appoint independent hearing officers who by contract or terms of employment shall preside over adjudicatory hearings pursuant to section three hundred fourteen of this article for the office and who are assigned no other work by the office;

[~~(h)~~] **(i)** notwithstanding the provisions of section two hundred ninety-six of this chapter, to file a complaint pursuant to the provisions of section two hundred ninety-seven of this chapter where the director has knowledge that a contractor may have violated the provisions of paragraph (a), (b) or (c) of subdivision one of section two hundred ninety-six of this chapter where such violation is unrelated, separate or distinct from the state contract as expressed by its terms;

[~~(i)~~] **(j)** to streamline the state certification process to accept federal and municipal corporation certifications;

[~~(j)~~] **(k)** to make publicly available records of all waivers of compliance reported pursuant to paragraph (b) of subdivision six of section three hundred thirteen of this article on the division's website; and

[~~(k)~~] **(l)** to work in conjunction with the industrial commissioner pursuant to paragraph (j) of subdivision one of section eight hundred eleven of the labor law to assist contractors in identifying minority group members and women who are participating in apprenticeship agreements under article twenty-three of the labor law.

4. The director shall provide assistance to, and facilitate access to programs serving certified businesses as well as applicants to ensure that such businesses benefit, as needed, from technical, managerial and financial, and general business assistance; training; marketing; organization and personnel skill development; project management assistance; technology assistance; bond and insurance education assistance; and other business development assistance. The director shall maintain a toll-free number at the department of economic development to be used to answer questions concerning the MWBE certification process. In addition, the director [~~may~~] **shall**, either independently or in conjunction with other state agencies:

(a) develop a clearinghouse of information on programs and services provided by entities that may assist such businesses;

(b) review bonding and paperwork requirements imposed by contracting agencies that may unnecessarily impede the ability of such businesses to compete; and

(c) seek to maximize utilization by minority and women-owned business enterprises of available federal resources including but not limited to federal grants, loans, loan guarantees, surety bonding guarantees, technical assistance, and programs and services of the federal small business administration.

(d) conduct outreach events, training workshops, seminars, and other such educational programs throughout the state, including all regional offices, to state agencies, external stakeholders, and the public, to promote awareness and utilization of minority and women-owned business enterprises; and

(e) identify and establish mentorship opportunities and other business development programs to increase capacity and better prepare MWBEs for bidding on contracts with state agencies upon successful completion of the mentorship opportunity. Such mentorship opportunities shall be intended to ensure that mentor and mentee are connected based on a commercially useful function.

§ 2. Subdivision 5 of section 312 of the executive law, as added by chapter 261 of the laws of 1988, is amended to read as follows:

5. The director shall promulgate rules and regulations to ensure that contractors and subcontractors undertake programs of affirmative action and equal employment opportunity as required by this section. Such rules and regulations as they pertain to any particular agency shall be developed after consultation with contracting agencies. Such rules and regulations [~~may~~] **shall** require a contractor, after notice in a bid solicitation, to submit an equal employment opportunity program [~~after bid opening and prior to the award of any contract~~] **at the time bids are submitted**, and [~~may~~] **shall** require the contractor or subcontractor to submit compliance reports relating to the contractor's or subcontractor's operation and implementation of any equal employment opportunity program in effect as of the date the contract is executed. The contracting agency [~~may recommend to the director that~~] **shall have the right to recommend that** the director take appropriate action according to the procedures set forth in section three hundred sixteen of this article against the contractor for noncompliance with the requirements of this section. The contracting agency shall be responsible for monitoring compliance with this section.

§ 3. Paragraph (j) of subdivision 2-a of section 313 of the executive law, as amended by chapter 96 of the laws of 2019, is amended and a new paragraph (k) is added to read as follows:

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

(k) encourage joint ventures, partnerships, and mentor-protege relationships as defined in section one hundred forty-seven of the state finance law, between prime contractors and minority and women-owned business enterprises; and

§ 4. Subdivision 3 and paragraph (a) of subdivision 5 of section 313 of the executive law, as amended by chapter 96 of the laws of 2019, are amended to read as follows:

3. Solely for the purpose of providing the opportunity for [~~meaningful~~] **increased** participation by certified businesses in the performance of state contracts as provided in this section, state contracts shall include leases of real property by a state agency to a lessee where: the terms of such leases provide for the construction, demolition, replacement, major repair or renovation of real property and improvements thereon by such lessee; and the cost of such construction, demolition, replacement, major repair or renovation of real property and improvements thereon shall exceed the sum of one hundred thousand dollars. Reports to the director pursuant to section three hundred fifteen of this article shall include activities with respect to all such state contracts. Contracting agencies shall include or require to be included with respect to state contracts for the acquisition, construction, demolition, replacement, major repair or renovation of real property and

improvements thereon, such provisions as [~~may~~] **shall** be necessary to effectuate the provisions of this section in every bid specification and state contract, including, but not limited to: (a) provisions requiring contractors to make a good faith effort to solicit active participation by enterprises identified in the directory of certified businesses; (b) requiring the parties to agree as a condition of entering into such contract, to be bound by the provisions of section three hundred sixteen of this article; and (c) requiring the contractor to include the provisions set forth in paragraphs (a) and (b) of this subdivision in every subcontract in a manner that the provisions will be binding upon each subcontractor as to work in connection with such contract. Provided, however, that no such provisions shall be binding upon contractors or subcontractors in the performance of work or the provision of services that are unrelated, separate or distinct from the state contract as expressed by its terms, and nothing in this section shall authorize the director or any contracting agency to impose any requirement on a contractor or subcontractor except with respect to a state contract.

(a) Contracting agencies shall administer the rules and regulations promulgated by the director in a good faith effort to achieve the maximum feasible participation by minority and women owned business enterprises adopted pursuant to this article and the regulations of the director. Such rules and regulations: shall require a contractor to submit a utilization plan [~~after bids are opened~~] **at the time bids are submitted**, 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 compliance issued pursuant to subdivision six of this section on the website of the contracting agency; shall require the contracting agency to notify the contractor in writing within a period of time specified by the director as to any deficiencies contained in the contractor's utilization plan; shall require remedy thereof within a period of time specified by the director; shall require the contractor to submit [~~periodic~~] **quarterly** compliance reports relating to the operation and implementation of any utilization plan; shall not allow any automatic waivers but shall allow a contractor to apply for a partial or total waiver of the minority and women-owned business enterprise participation requirements pursuant to subdivisions six and seven of this section; shall allow a contractor to file a complaint with the director pursuant to subdivision eight of this section in the event a contracting agency has failed or refused to issue a waiver of the minority and women-owned business enterprise participation requirements or has denied such request for a waiver; and shall allow a contracting agency to file a complaint with the director pursuant to subdivision nine of this section in the event a contractor is failing or has failed to comply with the minority and women-owned business enterprise participation requirements set forth in the state contract where no waiver has been granted.

§ 5. Subdivisions 1, 2-a and 3 of section 315 of the executive law, subdivisions 1 and 3 as amended and subdivision 2-a as added by chapter 96 of the laws of 2019, are amended and two new subdivisions 3-a and 8 are added to read as follows:

1. Each contracting agency shall be responsible for monitoring state contracts under its jurisdiction, and recommending matters to the office respecting non-compliance with the provisions of this article so that the office [~~may~~] **shall** take such action as [~~is appropriate~~] **stated in**

__subdivision three of section three hundred sixteen of this article. Each contracting agency shall have the right to recommend that the director impose a sanction, penalty, or fine for three or more violations of subdivision one of section three hundred sixteen of this article,__ to ensure compliance with the provisions of this article, the rules and regulations of the director issued hereunder and the contractual provisions required pursuant to this article. All contracting agencies shall comply with the rules and regulations of the office and are directed to cooperate with the office and to furnish to the office such information and assistance as may be required in the performance of its functions under this article.

2-a. [~~To the extent practicable, upon completion of the restrictive period of a procurement, each~~] __Each__ contracting agency when notifying a contractor of a winning bid award shall also notify any minority or women-owned business enterprise identified in the contractor's submitted utilization plan of such contractor's receipt of the winning bid award.

3. Each contracting agency shall report to __the commissioner of economic development, the commissioner of general services and__ the director with respect to activities undertaken to promote employment of minority group members and women and promote and increase participation by certified businesses with respect to state contracts and subcontracts. Such reports shall be submitted [~~no later than May fifteenth of every year~~] __quarterly__ and shall include such information as is necessary for the director to determine whether the contracting agency and any contractor to the contracting agency have complied with the purposes of this article, including, without limitation, __the number of state contracts awarded to certified minority or women-owned business enterprises; the maximum dollar amount obligated pursuant to all those contracts; and the total expenditures made pursuant to all such contracts; the number of state contracts awarded which include a utilization plan for business participation by certified minority or women-owned business enterprises, the maximum amount obligated pursuant to those contracts, and the total expenditures made pursuant to all such contracts;__ a summary of all waivers of the requirements of subdivisions six and seven of section three hundred thirteen of this article 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__, the maximum amount obligated pursuant to those contracts; the number of state contracts awarded which required goals for employment of minority group members and women; the number of state contracts awarded for which waivers of employment goals required by the contracts have been granted,__ and any instances in which the contract agency has deemed a contractor to have committed a violation pursuant to section three hundred sixteen of this article and such other information as the director shall require. Each agency shall also include in such annual report whether or not it has been required to prepare a remedial plan, and, if so, the plan and the extent to which the agency has complied with each element of the plan.

__3-a. Within thirty days after completion, a copy of the quarterly minority and women-owned business enterprise report shall be transmitted to the commissioner of economic development, the commissioner of general services, and the director. A contracting agency, which has not let more than two million dollars in service and/or construction contracts within the applicable period may apply to the commissioner of economic development, and the director for a waiver of the required annual report. The__ waiver application shall be made on such form as the commissioner of economic development and the director may prescribe.

8. If a contracting agency shall fail to file or substantially complete, as determined by the commissioner of economic development and the director, the report required by this section, the director shall provide notice to the contracting agency. The notice shall state the following:

(a) that the failure to file a report as required is a violation of this section, or in the case of an insufficient report, the manner in which the report submitted is deficient;

(b) that the contracting agency has thirty days to comply with this section or provide an adequate written explanation to the commissioner of economic development and the commissioner of general services and the director of the contracting agency's reasons for the inability to comply; and

(c) that the contracting agency's continued failure to provide either the required report or an adequate explanation will result in an independent audit of the contracting agency, the cost of which shall be borne by the contracting agency.

§ 6. Section 316 of the executive law, as amended by chapter 175 of the laws of 2010, is amended to read as follows:

§ 316. [~~Enforcement~~] Violations and enforcement. 1. It shall be a violation for any person or entity to:

a. intentionally use or acquire an MWBE name through deceit or other dishonest means in order to negotiate a lower bid from a non-MWBE.

b. submit to the department of economic development, documents or other material as evidence of a good faith effort to comply with the provisions of this article without, in fact, having entered into any contract, agreement, subcontract, or sub-agreement with an MWBE for the use or purchase of such business enterprise's goods or services in the performance of the awarded state contract.

c. fail to provide an MWBE with sufficient information or other required supporting documentation in order for the MWBE to prepare a proper bid.

2. Upon receipt by the director 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 article 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 six of section three hundred thirteen of this article or has denied such application, the director 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 director shall refer the matter, within thirty days of the receipt of the complaint, to the division's hearing officers. Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract and recommendations regarding the imposition of sanctions, fines or penalties. The director, 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

director 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 minority and women-owned 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 division of minority and women's business 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.

3. The director shall impose a sanction, penalty, or fine on any individual or entity that has three or more violations of this article within five years. Such fine shall be paid by such individual or entity. Such fine shall be remitted and deposited into a fund, to be managed by the commissioner of economic development. Such funds shall be used to subsidize the facilitation of the provisions of this article. Other sanctions shall include barring such entity or individual from contracting with such agency for a period not to exceed five years.

§ 7. Subdivision 1 of section 137 of the state finance law, as separately amended by section 17 of part MM of chapter 57 and chapter 619 of the laws of 2008, is amended to read as follows:

1. In addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a public benefit corporation or a commission appointed pursuant to law, or in the absence of any such requirement, the comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or any subcontractors in the prosecution of the work provided for in such contract. Whenever a municipal corporation issues a permit subject to compliance with section two hundred twenty of the labor law, such permittee or its contractor or subcontractors furnishing workers shall post a payment bond subject to this section. Provided, however, that all performance bonds and payment bonds may, at the discretion of the head of the state agency, public benefit corporation or commission, or his or her designee, be dispensed with for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York for which bids are solicited where the aggregate amount of the contract is under one hundred thousand dollars and provided further, that in a case where the contract is not subject to the multiple contract award requirements of section one hundred thirty-five of this article, such requirements may be dispensed with where the head of the state agency, public benefit corporation or commission finds it to be in the public interest and where the aggregate amount of the contract awarded or to be awarded is less than two hundred thousand dollars. **In a**

case where a contract is awarded to a small business concern or to a minority or women-owned business concern, all performance bonds and payment bonds may be dispensed with when the aggregate amount of the contract is under five hundred thousand dollars. Advertisements for bids shall provide information as to the requirements for, or dispensation of, performance and payment bonds. Provided further, that in a case where a performance or payment bond is dispensed with, twenty per centum may be retained from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the head of the state agency, public benefit corporation or commission shall, pending the payment of the final estimate, pay not to exceed seventy-five per centum of the amount of the retained percentage.

§ 8. Subdivision 4 of section 139-f of the state finance law, as amended by chapter 83 of the laws of 1995, is amended to read as follows:

4. Notwithstanding any other provision of this section or other law, requirements for the furnishing of a performance bond or a payment bond may be dispensed with at the discretion of the head of the state agency or corporation, or his or her designee, where the public owner is a state agency or corporation described in subdivision one-a of this section and the aggregate amount of the contract awarded or to be awarded is under fifty thousand dollars and, in a case where the contract is not subject to the multiple contract award requirements of section one hundred thirty-five of this article, such requirements may be dispensed with where the head of the state agency or corporation finds it to be in the public interest and where the aggregate amount of the contract awarded or to be awarded is under two hundred thousand dollars. **In a case where a contract is awarded to a small business concern or to a minority or women-owned business concern, all performance bonds and payment bonds may be dispensed with when the aggregate amount of the contract is under five hundred thousand dollars. Advertisements for proposals shall provide information as to the requirements for, or dispensation of, performance and payment bonds.** Provided further, that in a case where a performance or payment bond is dispensed with, twenty per centum may be retained from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the head of the state agency or corporation shall, pending the payment of the final estimate, pay not to exceed seventy-five per centum of the amount of the retained percentage.

§ 9. The opening paragraph of section 139-g of the state finance law, as amended by chapter 636 of the laws of 2003, is amended to read as follows:

In every state agency, department and authority which has let more than two million dollars in service and construction contracts **and state assisted project contracts** in the prior fiscal year, the chief executive officer of that agency, department or authority shall, with respect to those contracts **and state assisted project contracts** let by his **or her** agency, department or authority:

§ 10. The opening paragraph of subdivision (b) of section 139-g of the state finance law, as amended by chapter 636 of the laws of 2003, is amended to read as follows:

identify all small-business and certified women and minority-owned business concerns which, in the judgment of the chief executive officer of that agency, department or authority, can bid on those contracts **and state assisted project contracts** which are usually and customarily let by that agency, department or authority**, or in which that authority** provides a grant or loan or tax exempt financing, with a reasonable expectation of success. Such chief executive officers shall carry out the provisions of this subdivision:

§ 11. Section 139-g of the state finance law is amended by adding a new subdivision (e) to read as follows:

(e) for the purposes of this section, the following words shall have the following meanings:

(i) "State assisted project contract" shall mean any written agreement arising out of a state assisted housing project or state assisted economic development project or state assisted higher education project or state assisted hospital or health care facility project, for which the total project cost exceeds two million dollars and for which the project owner is committed to spend or does expend funds for the acquisition, construction, demolition, replacement, major repair, or renovation of real property and improvements thereon for such project.

(ii) "State assisted housing project" shall mean those projects which receive from the New York state housing finance agency tax-exempt financing for all or part of the total project cost.

(iii) "State assisted economic development project" shall mean those projects which receive from the New York foundation of science technology and innovation, or the urban development corporation and its subsidiaries a grant or loan or tax-exempt financing for all or part of the total project cost.

(iv) "State assisted higher education project" shall mean those projects which receive from the dormitory authority of the state of New York a grant or loan or tax-exempt financing for all or part of the total project cost.

(v) "State assisted hospital or health care facility project" shall mean those projects which receive from the dormitory authority of the state of New York a grant or loan or tax-exempt financing for all or part of the total project cost.

§ 12. This act shall take effect immediately, provided however, the amendments to article 15-A of the executive law made by sections one through six of this act shall not affect the expiration of such article and shall expire therewith.