

# STATE OF NEW YORK

841

2023-2024 Regular Sessions

## IN SENATE

January 6, 2023

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

AN ACT to amend the executive law and the state finance law, in relation to minority and women-owned business enterprise fraud and the monies of the minority and women-owned business enterprise fund; to amend a chapter of the laws of 2022 amending the executive law and the state finance law relating to minority and women-owned business enterprises post completion certification, duties of the director and creating the minority and women-owned business enterprise fund, as proposed in legislative bills numbers S. 3390-A and A. 9259-A, in relation to the effectiveness thereof; and to repeal certain provisions of the executive law relating thereto

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

1 Section 1. Section 314-a of the executive law, as added by a chapter  
2 of the laws of 2022 amending the executive law and the state finance law  
3 relating to minority and women-owned business enterprises post  
4 completion certification, duties of the director and creating the minor-  
5 ity and women-owned business enterprise fund, as proposed in legislative  
6 bills numbers S. 3390-A and A. 9259-A, is REPEALED.  
7 § 2. Subdivision 5 of section 313 of the executive law, as amended by  
8 chapter 96 of the laws of 2019, is amended to read as follows:  
9 5. (a) Contracting agencies shall administer the rules and regulations  
10 promulgated by the director in a good faith effort to achieve the maxi-  
11 mum feasible participation by minority and women owned business enter-  
12 prises adopted pursuant to this article and the regulations of the  
13 director. Such rules and regulations: shall require a contractor to  
14 submit a utilization plan after bids are opened, when bids are required,  
15 but prior to the award of a state contract; shall require the contract-  
16 ing agency to review the utilization plan submitted by the contractor  
17 and to post the utilization plan and any waivers of compliance issued

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

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1 pursuant to subdivision six of this section on the website of the  
2 contracting agency; shall require the contracting agency to notify the  
3 contractor in writing within a period of time specified by the director  
4 as to any deficiencies contained in the contractor's utilization plan;  
5 shall require remedy thereof within a period of time specified by the  
6 director; shall require the contractor to submit [~~periodic~~] compliance  
7 reports relating to the operation and implementation of any utilization  
8 plan; shall not allow any automatic waivers but shall allow a contractor  
9 to apply for a partial or total waiver of the minority and women-owned  
10 business enterprise participation requirements pursuant to subdivisions  
11 six and seven of this section; shall allow a contractor to file a  
12 complaint with the director pursuant to subdivision eight of this  
13 section in the event a contracting agency has failed or refused to issue  
14 a waiver of the minority and women-owned business enterprise partic-  
15 ipation requirements or has denied such request for a waiver; and shall  
16 allow a contracting agency to file a complaint with the director pursu-  
17 ant to subdivision nine of this section in the event a contractor is  
18 failing or has failed to comply with the minority and women-owned busi-  
19 ness enterprise participation requirements set forth in the state  
20 contract where no waiver has been granted.

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

31 (c) The rules and regulations promulgated pursuant to this subdivision  
32 regarding compliance reports shall provide that such reports shall  
33 include a standardized prepayment declaration, to be completed before  
34 each payment to a contractor, in which: (i) a representative of the  
35 contractor lists any business that was or shall be relied upon for cred-  
36 it toward minority and women-owned business enterprise participation and  
37 states under penalty of perjury that such business or businesses  
38 appeared on the division's directory of certified minority and women-  
39 owned business enterprises at the time of contracting and that each  
40 business performed or shall perform a commercially useful function on  
41 the contract; and (ii) a representative of any business that was or  
42 shall be relied upon for credit toward minority and women-owned business  
43 enterprise participation states under penalty of perjury that it  
44 appeared on the division's directory of certified minority and women-  
45 owned business enterprises at the time of contracting and performed or  
46 shall perform a commercially useful function on the contract. Such  
47 standardized prepayment declarations shall be submitted electronically  
48 on a centralized state registry designated by the division prior to any  
49 payment to a contractor. The rules and regulations promulgated pursuant  
50 to this subdivision may also require the contractor or subcontractor to  
51 submit documentation, as needed, to support any statements made in such  
52 standardized prepayment declarations.

53 (d) Without limiting other grounds for the disqualification of bids or  
54 proposals on the basis of non-responsibility, a contracting agency may  
55 disqualify the bid or proposal of a contractor as being non-responsible  
56 for failure to remedy notified deficiencies contained in the contrac-

1 tor's utilization plan within a period of time specified in regulations  
2 promulgated by the director after receiving notification of such defi-  
3 ciencies from the contracting agency. Where failure to remedy any noti-  
4 fied deficiency in the utilization plan is a ground for disqualifica-  
5 tion, that issue and all other grounds for disqualification shall be  
6 stated in writing by the contracting agency. Where the contracting agen-  
7 cy states that a failure to remedy any notified deficiency in the utili-  
8 zation plan is a ground for disqualification the contractor shall be  
9 entitled to an administrative hearing, on a record, involving all  
10 grounds stated by the contracting agency. Such hearing shall be  
11 conducted by the appropriate authority of the contracting agency to  
12 review the determination of disqualification. A final administrative  
13 determination made following such hearing shall be reviewable in a  
14 proceeding commenced under article seventy-eight of the civil practice  
15 law and rules, provided that such proceeding is commenced within thirty  
16 days of the notice given by certified mail return receipt requested  
17 rendering such final administrative determination. Such proceeding shall  
18 be commenced in the supreme court, appellate division, third department  
19 and such proceeding shall be preferred over all other civil causes  
20 except election causes, and shall be heard and determined in preference  
21 to all other civil business pending therein, except election matters,  
22 irrespective of position on the calendar. Appeals taken to the court of  
23 appeals of the state of New York shall be subject to the same prefer-  
24 ence.

25 § 3. Paragraphs (f), (h), (i), (j), (k), (l), (m) and (n) of subdivi-  
26 sion 3 of section 311 of the executive law, paragraphs (f) and (j) as  
27 amended and paragraphs (l), (m) and (n) as added by a chapter of the  
28 laws of 2022 amending the executive law and the state finance law relat-  
29 ing to minority and women-owned business enterprises post completion  
30 certification, duties of the director and creating the minority and  
31 women-owned business enterprise fund, as proposed in legislative bills  
32 numbers S. 3390-A and A. 9259-A, and paragraphs (h), (i) and (k) as  
33 amended by chapter 825 of the laws of 2021, are amended to read as  
34 follows:

35 (f) to prepare and update, no less than annually, a directory of  
36 certified minority and women-owned business enterprises which shall,  
37 wherever practicable, (i) make publicly available records of all certifi-  
38 fications and recertifications, (ii) be divided into categories of labor,  
39 services, supplies, equipment, materials and recognized construction  
40 trades, and [which shall] (iii) indicate areas or locations of the state  
41 where such enterprises are available to perform services[ ~~, and to use~~  
42 ~~this information to create an internet based, searchable, centralized~~  
43 ~~state registry detailing certifications, waivers, and all documents~~  
44 ~~submitted pertaining to certification or denial of certification, or~~  
45 ~~compliance with goals for utilization of minority and women-owned busi-~~  
46 ~~ness enterprises];~~

47 (h) to make publicly available on the division's website records of  
48 all revocations of certification for convictions for fraudulently  
49 misrepresenting the status of minority or women-owned business enter-  
50 prises or for evidence of fraudulent conduct with regard to partic-  
51 ipation of a minority or women-owned business enterprise in the perform-  
52 ance of state contracts and the reasoning for such revocations after a  
53 final determination has been made, provided that information falling  
54 into the categories enumerated in paragraphs (a) through (j) of subdivi-  
55 sion two of section eighty-seven of the public officers law shall be  
56 withheld;

1 (i) notwithstanding the provisions of section two hundred ninety-six  
 2 of this chapter, to file a complaint pursuant to the provisions of  
 3 section two hundred ninety-seven of this chapter where the director has  
 4 knowledge that a contractor may have violated the provisions of para-  
 5 graph (a), (b) or (c) of subdivision one of section two hundred ninety-  
 6 six of this chapter where such violation is unrelated, separate or  
 7 distinct from the state contract as expressed by its terms;

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

10 ~~[(j)]~~ (k) to make publicly available on the division's website records  
 11 of all waivers of compliance reported pursuant to paragraph (b) of  
 12 subdivision six of section three hundred thirteen of this article [~~on~~  
 13 ~~the division's website~~], including the reasoning for denial of such  
 14 wavers after a final determination has been made, provided that infor-  
 15 mation falling into the categories enumerated in paragraphs (a) through  
 16 (j) of subdivision two of section eighty-seven of the public officers  
 17 law shall be withheld;

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

23 ~~(l) to perform inspections of minority or women-owned business's place~~  
 24 ~~of business, warehouse or storage facility to confirm the existence of a~~  
 25 ~~workforce, equipment and supplies]; and~~

26 (m) to ~~perform~~ coordinate with appropriate offices, agencies, or  
 27 authorities, where applicable, to conduct site visits or perform  
 28 inspections of financial records of minority or women-owned business  
 29 enterprises [~~to ensure such enterprises are~~] in [~~compliance~~] accordance  
 30 with [~~applicable laws, and~~

31 ~~(n) to ensure the protection of individuals who report suspected~~  
 32 ~~violations of this article and applicable laws related to minority and~~  
 33 ~~women-owned business enterprises] this article and the regulations of~~  
 34 the director.

35 § 4. Subdivision 3 of section 97-k of the state finance law, as added  
 36 by a chapter of the laws of 2022 amending the executive law and the  
 37 state finance law relating to minority and women-owned business enter-  
 38 prises post completion certification, duties of the director and creat-  
 39 ing the minority and women-owned business enterprise fund, as proposed  
 40 in legislative bills numbers S. 3390-A and A. 9259-A, is amended to read  
 41 as follows:

42 3. Monies of the fund, following appropriation by the legislature,  
 43 shall be expended by the appropriate New York state offices, agencies,  
 44 or authorities to acquire software, employ personnel to audit, investi-  
 45 gate and prosecute minority and women-owned business enterprise fraud  
 46 and to underwrite minority and women-owned business enterprise programs  
 47 to assist minority and women business enterprise owners to develop  
 48 sustainable businesses, provided that expenditures for such activities  
 49 shall only be required under this section to the extent that monies are  
 50 available in the fund to support them.

51 § 5. Section 6 of a chapter of the laws of 2022 amending the executive  
 52 law and the state finance law relating to minority and women-owned busi-  
 53 ness enterprises post completion certification, duties of the director  
 54 and creating the minority and women-owned business enterprise fund, as  
 55 proposed in legislative bills numbers S. 3390-A and A. 9259-A, is  
 56 amended to read as follows:

1 § 6. This act shall take effect [~~immediately~~] on the one hundred  
2 eightieth day after it shall have become a law; provided, however, that  
3 the amendments to article 15-A of the executive law made by sections  
4 one, two, three and four of this act shall not affect the repeal of such  
5 article and shall be deemed repealed therewith.

6 § 6. This act shall take effect immediately; provided, however, that  
7 sections one, two, three and four of this act shall take effect on the  
8 same date and in the same manner as a chapter of the laws of 2022 amend-  
9 ing the executive law and the state finance law relating to minority and  
10 women-owned business enterprises post completion certification, duties  
11 of the director and creating the minority and women-owned business  
12 enterprise fund, as proposed in legislative bills numbers S. 3390-A and  
13 A. 9259-A, takes effect; and provided, further, that the amendments made  
14 to article 15-A of the executive law made by sections two and three of  
15 this act shall not affect the repeal of such article and shall be deemed  
16 repealed therewith.