*** § 313. Opportunities for minority and women-owned business enterprises.** 1. Goals and requirements for agencies and contractors. Each agency shall structure procurement procedures for contracts made directly or indirectly to minority and women-owned business enterprises, in accordance with the findings of the disparity study, consistent with the purposes of this article, to attempt to achieve the recommended results with regard to total annual statewide procurement in the following industries:

(a) construction industry for certified minority-owned business enterprises;

(b) construction industry for certified women-owned business enterprises;

(c) construction related professional services industry for certified minority-owned business enterprises;

(d) construction related professional services industry for certified women-owned business enterprises;

(e) non-construction related services industry for certified minority-owned business enterprises;

(f) non-construction related services industry for certified women-owned business enterprises;

(g) commodities industry for certified minority-owned business enterprises;

(h) commodities industry for certified women-owned business enterprises;

(i) overall agency total dollar value of procurement for certified minority-owned business enterprises;

(j) overall agency total dollar value of procurement for certified women-owned business enterprises; and

(k) overall agency total dollar value of procurement for certified minority, women-owned business enterprises.

1-a. The director shall ensure that each state agency has been provided with an electronic copy of the disparity study.

1-b. Each agency shall develop and adopt agency-specific goals based on the findings of the disparity study.

1-c. The goals set pursuant to subdivision one of this section shall be consistent with the findings of the disparity study.

2. The director shall promulgate rules and regulations based on subdivision one of this section and the findings of the disparity study that provide measures and procedures to ensure that certified minority and women-owned businesses shall be given the opportunity for maximum feasible participation in the performance of state contracts and to assist in the agency's identification of those state contracts for which minority and women-owned certified businesses may best bid to actively and affirmatively promote and assist their participation in the performance of state contracts so as to facilitate the agency's achievement of the maximum feasible portion of the goals for state contracts to such businesses.

2-a. The director shall promulgate rules and regulations that will accomplish the following:

(a) provide for the certification and decertification of minority and women-owned business enterprises for all agencies through a single process that meets applicable requirements;

(b) require that each contract solicitation document accompanying each solicitation set forth the expected degree of minority and women-owned business enterprise participation based, in part, on:

(i) the potential subcontract opportunities available in the prime procurement contract;

(ii) the availability, as contained within the study, of certified minority and women-owned business enterprises to respond competitively to the potential subcontract opportunities as reflected in the division's directory of certified minority and women-owned business enterprises; and

(iii) the findings of the disparity study;

(c) require that each agency provide a current list of certified minority business enterprises to each prospective contractor or direct them to the division's directory of certified minority and women-owned business enterprises for such purpose;

(d) allow a contractor that is a certified minority-owned or women-owned business enterprise to use the work it performs to meet

requirements for use of certified minority-owned or women-owned business enterprises as subcontractors;

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

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

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

(h) require that an agency verify that minority and women-owned business enterprises listed in a successful bid are actually participating to the extent listed in the project for which the bid was submitted;

(i) provide for the collection of statistical data by each agency concerning actual minority and women-owned business enterprise participation;

(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

Such rules shall set forth the maximum personal net worth of a minority group member or woman who may be relied upon to certify a business as a minority-owned business enterprise or women-owned business enterprise, and may establish different maximum levels of personal net worth for minority group members and women on an industry-by-industry basis for such industries as the director shall determine. Such regulations relating to the classification of the industry-by-industry personal net worth thresholds above the fifteen million dollar threshold shall consider the personal net worth of the owners of both certified and non-certified businesses, including but not limited to, prime contractors and subcontractors, as well as any such other factors needed to establish such thresholds. The provisions of the regulations pertaining to personal net worth shall, to the extent practicable, be

implemented by June thirtieth, two thousand twenty and shall consider adjustments for inflation annually on January first of the previous year according to the consumer price index.

3. Solely for the purpose of providing the opportunity for meaningful 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 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.

4. In the implementation of this section, the contracting agency shall

(a) consult the findings contained within the disparity study evidencing relevant industry specific disparities in the utilization of minority and women-owned businesses relative to their availability;

(b) implement a program that will enable the agency to evaluate each contract to determine the appropriate goal for participation by minority-owned business enterprises and women-owned business enterprises;

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

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

5. (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, 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 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.

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

(c) The rules and regulations promulgated pursuant to this subdivision regarding compliance reports shall provide that such reports shall include a standardized prepayment declaration, to be completed before each payment to a contractor, in which: (i) a representative of the contractor lists any business that was or shall be relied upon for credit toward minority and women-owned business enterprise participation and states under penalty of perjury that such business or businesses appeared on the division's directory of certified minority and women-owned business enterprises at the time of contracting and that each business performed or shall perform a commercially useful function on the contract; and (ii) a representative of any business that was or shall be relied upon for credit toward minority and women-owned business enterprise participation states under penalty of perjury that it appeared on the division's directory of certified minority and women-owned business enterprises at the time of contracting and performed or shall perform a commercially useful function on the contract. Such standardized prepayment declarations shall be submitted

electronically on a centralized state registry designated by the division prior to any payment to a contractor. The rules and regulations promulgated pursuant to this subdivision may also require the contractor or subcontractor to submit documentation, as needed, to support any statements made in such standardized prepayment declarations.

(d) Without limiting other grounds for the disqualification of bids or proposals on the basis of non-responsibility, a contracting agency may disqualify the bid or proposal of a contractor as being non-responsible for failure to remedy notified deficiencies contained in the contractor's utilization plan within a period of time specified in regulations promulgated by the director after receiving notification of such deficiencies from the contracting agency. Where failure to remedy any notified deficiency in the utilization plan is a ground for disqualification, that issue and all other grounds for disqualification shall be stated in writing by the contracting agency. Where the contracting agency states that a failure to remedy any notified deficiency in the utilization plan is a ground for disqualification the contractor shall be entitled to an administrative hearing, on a record, involving all grounds stated by the contracting agency. Such hearing shall be conducted by the appropriate authority of the contracting agency to review the determination of disqualification. A final administrative determination made following such hearing shall be reviewable in a proceeding commenced under article seventy-eight of the civil practice law and rules, provided that such proceeding is commenced within thirty days of the notice given by certified mail return receipt requested rendering such final administrative determination. Such proceeding shall be commenced in the supreme court, appellate division, third department and such proceeding shall be preferred over all other civil causes except election causes, and shall be heard and determined in preference to all other civil business pending therein, except election matters, irrespective of position on the calendar. Appeals taken to the court of appeals of the state of New York shall be subject to the same preference.

6. (a) Where it appears that a contractor cannot, after a good faith effort, comply with the minority and women-owned business enterprise participation requirements set forth in a particular state contract, a

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

(b) Upon the issuance of all waivers of compliance as provided in paragraph (a) of this subdivision, the contracting agency shall: (i) report the issuance of the waiver to the director; and (ii) publish on the contracting agency's website on a monthly basis, if practicable, but no less than on a quarterly basis, in a location easily accessible to the general public: (1) information identifying the contract, including the value of the contract; (2) the name of the contractor receiving the waiver; (3) the date of the waiver; (4) whether the waiver was a partial or total waiver; and (5) the specific contract provisions to which the waiver applies.

7. For purposes of determining a contractor's good faith effort to comply with the requirements of this section or to be entitled to a waiver therefrom the contracting agency shall consider:

(a) whether the contractor has advertised in general circulation media, trade association publications, and minority-focus and women-focus media and, in such event, (i) whether or not certified

minority or women-owned businesses which have been solicited by the contractor exhibited interest in submitting proposals for a particular project by attending, or having attended, a pre-bid conference, if any, scheduled by the state agency awarding the state contract with certified minority and women-owned business enterprises; and

(ii) whether certified businesses which have been solicited by the contractor have responded in a timely fashion to the contractor's solicitations for timely competitive bid quotations prior to the contracting agency's bid date; and

(b) whether the contractor provided timely written notification of subcontracting opportunities on the state contract to appropriate certified businesses that appear in the directory of certified businesses prepared pursuant to paragraph (f) of subdivision three of section three hundred eleven of this article; and

(c) whether the contractor can reasonably structure the amount of work to be performed under subcontracts in order to increase the likelihood of participation by certified businesses.

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

9. If, after the review of a contractor's minority and women-owned business utilization plan or review of a periodic compliance report and after such contractor has been afforded an opportunity to respond to a notice of deficiency issued by the contracting agency in connection therewith, it appears that a contractor is failing or refusing to comply with the minority and women-owned business participation requirements as set forth in the state contract and where no waiver from such

requirements has been granted, the contracting agency may file a written complaint with the director pursuant to section three hundred sixteen of this article setting forth the facts and circumstances giving rise to the contracting agency's complaint together with a demand for relief. The contracting agency shall serve a copy of such complaint upon the contractor by personal service or by certified mail, return receipt requested. The contractor shall be afforded an opportunity to respond to such complaint in writing.

* NB Repealed July 1, 2028