

January 22, 2019

Governor Cuomo's FY 2020 Executive Budget Re-Do on MWBE Reforms, This Time with a Democrat Controlled Senate . . .

By: B. Seth Bryant, Esq.

What a difference an election makes. Following strong push back by New York State Senate Republicans in 2018 and a November 2018 election that switched Senate control to the Democratic Party, on January 15, 2019, Governor Cuomo issued New York State's FY 2020 Executive Budget, which reintroduced the Governor's MWBE program improvements from the prior year's budget proposal. In 2018, given Senate Republican opposition, the Governor's MWBE proposals were "dead on arrival". Instead of achieving major structural reforms, faced with the realities of the Senate Republican's power, Governor Cuomo was forced to settle for a simple one year extension of the State's MWBE program. With the FY 2020 Executive Budget proposal, however, given Democratic control of the New York State Senate, Assembly and Governor's office, the chances of the Governor's proposals becoming law are significantly higher.

The FY 2020 Executive Budget proposal includes important MWBE reforms that if passed into law will address deficiencies long identified as being major hindrances to the program's operations. The reforms address areas such as the timing of certification review, unfair aspects of the personal net worth test, weak penalties for businesses committing MWBE fraud, making it easier for majority firms to demonstrate good faith efforts in program compliance and to get the benefit of having strong diversity practices, and expanding the program to local governments that undertake projects using State appropriations, among others. In addition to those reforms, Governor Cuomo's budget proposal includes reforms in contractor workforce diversity.

Below is a summary of the MWBE Program proposals in PART AA of the New York State FY 2020 Executive Budget Proposal (the "Governor's Budget").

1. Proposed Amendments to Certain Definitions in Section 310 of Article 15-A of the Executive Law



BRYANT RABBINO^{LLP}

650 Fifth Avenue, Suite 3300, New York, NY 10019

Tel: 212-967-1800 Fax: 212-967-1811

www.bryantrabbino.com

Contracting Agency, State Funded Entity and State Contracts

The Governor's Budget expands the definition of "Contracting Agency", which is currently defined to include identified State agencies and authorities that are required to comply with the rules of the State's MWBE program. The revised definition would add "State Funded Entity", which is a new definition proposed in the Governor's Budget that means local governmental entities and schools that receive State appropriations for specific projects, which would be covered by the amended law as Contracting Agencies.

The Governor's Budget amends the definition "State Contract" to add language for certain contracts with State Funded Entities. The amended definition would make the State's MWBE program apply to contracts or purchase orders for goods or services involving State Funded Entities for amounts in excess of \$50,000 where such amounts are appropriated from the State.

Personal Net Worth

The Governor's Budget amends the definitions "Minority-owned business enterprise", "Minority Group Member" and "Women owned business enterprise" to add that certified entities may not be owned by an individual (or married couple) with a Personal Net Worth in excess of \$3.5 million "or such other amount as the director shall set forth in regulation." This change addresses the perceived deficiency of a one size fits all approach to the Personal Net Worth test. This modification would allow the director to ascribe higher or lower Personal Net Worth levels based on the industry of MWBE certified businesses – owners of businesses in industries should be compared to other owners of businesses in the same industry.

Many have argued that the existing law is unfair since, for example, a \$3.5 million personal net worth of an owner of a commodity products business versus a \$3.5 million personal net worth of an owner of an investment bank likely reflects a different level of professional success relative to industry peers. For investment bankers, a \$3.5 million personal net worth may mean that the owner has had moderate success but not industry dominating success. A commodity seller's \$3.5 million personal net worth likely equates to greater level of relative industry success. The change allows the director the flexibility to rationalize net worth levels based on industries, while providing the \$3.5 million bright line test.

In addition, the definition "Personal Net Worth" would be modified to exclude an individual's ownership of a holding company that leases certain machinery or equipment to the certified entity. The proposed amended definition also would change the full exclusion of the individual's home from the individual's personal net worth calculation. The change would limit

the exclusion to up to 200% of the median value of the homes in the municipality in which the individual resides.

Diversity Practices

Under the Governor’s Budget, the definition “*Diversity Practices*” would be modified to indicate that “*Diversity Practices*” relates to “mentoring” instead of “utilizing” certified MWBE firms and that the contractor’s management and executive officers include minorities and women.

2. Proposed Amendments to Provisions related to the Division of MWBE Development in Section 311 of Article 15-A of the Executive Law

The Governor’s Budget makes certain technical and clarifying changes related to the operation of the Division, including provisions related to empowering the Statewide MWBE Advocate to conduct periodic audits of Contracting Agencies and to investigate complaints related to such agencies.

3. Proposed Amendments to Provisions related to a Disparity Study in Section 312-a of Article 15-A of the Executive Law

The Governor’s Budget authorizes the director to recommission a statewide disparity study. As compared to prior revisions to Section 312-a, the revision does not create a deadline for completion of the disparity study. However, since the expiration date of the MWBE Law is December 31, 2024, the study would need to be completed before that date for the law to be re-authorized under current law.

4. Proposed Amendments to Provisions related to MWBE Goals in Section 313 of Article 15-A of the Executive Law

The Governor’s Budget would amend Section 313 of the Executive Law to cause Contracting Agencies to structure procurements in accordance with the finding of the 2016 Disparity Study and MWBE goals specified by the director. The amendments also clarify certain procurement processes and MWBE tracking requirements that the director would be responsible for promulgating through rules and regulations, including new provisions on reporting by State Funded Entities.

5. Proposed Amendments to Provisions related to the Statewide MWBE Certification Program in Section 314 of Article 15-A of the Executive Law

The Governor's Budget would amend Section 314 of the Executive Law, which codifies general provisions related to the State's certification program, to among other changes (i) reflect that certification could be revoked in the event that the certified entity or its principals were convicted of MWBE fraud and (ii) add provisions relating to personal net worth levels on an industry by industry basis. In addition, the proposed changes would require entities applying for certification to agree that the New York State Department of Taxation and Finance and the New York State Department of Labor could share information about the entity with the Division of MWBE Development.

Importantly, to address timing concerns for businesses applying for certification, the proposed amendment includes that the Director shall provide a written notice of determination-approving or denying certification-within thirty (30) days after the applicant's submission of a complete certification application. The current law requires a decision within sixty (60) days after a complete submission. The Division's actual practice has been significantly slower.

6. Proposed Amendments to Provisions related to the Contracting Agency Requirements in Section 315 of Article 15-A of the Executive Law

The Governor's Budget Proposal would amend certain provisions related to the obligations of Contracting Agencies in implementing the MWBE Program. The proposed amendments remove the obligation of Contracting Agencies to provide bidders with a copy of the directory of certified MWBEs and a copy of the State's MWBE regulations. The proposal adds to Contracting Agency reporting requirements that it report to the Director of the Division any violations of the State's MWBE program laws, among other changes.

7. Proposed Amendments to Provisions related to Prohibitions in Contracts in Section 316-a of Article 15-A of the Executive Law

The Governor's Budget Proposal would amend language related to willful and intentional non-compliance with MWBE laws to add the new, proposed criminal penalties for such non-compliance (See Section 11 below).

8. Proposed Amendments to Provisions related to Discretionary Spending Thresholds under Section 163-a of the State Finance Law and Section 2879(3) of the Public Authorities Law

The Governor's Budget Proposal would amend the discretionary purchase program provisions under the State Finance Law and the Public Authorities Law to allow Contracting Agencies to

make purchases of goods or services with a contract value of \$400,000 or less from MWBEs outside of the regular procurement process. The existing program allows for purchases of \$200,000 or less from MWBEs outside of the regular procurement process.

9. Proposed Amendments to Provisions related to the Procurement Process under Section 139-j(a) of the State Finance Law

The Governor’s Budget Proposal would amend the provisions related to permissible contacts during a procurement to provide for a new set of communications, contacts between the bidder and the Director of the Division or the Statewide Advocate related to complaints or investigations connected to the procurement.

10. Proposed Amendments to Provisions related to the Lowest Responsible Bidder Requirements under Section 8 of the Public Buildings Law

The Governor’s Budget Proposal would amend the provisions related to contracts for \$1.4 million or less that relate to improving state owned buildings. Presently, the provision requires that such contracts be issued to the lowest responsible bidder. The amendment makes an exception for responsible MWBE bidders who, so long as the contract is for \$1.4 million or less, shall be awarded the contract if they bid, unless the bid is greater than 10% of any other bid.

11. Proposed Amendments to the Penal Law related to MWBE Fraud

The Governor’s Budget Proposal would add a new section to the New York State Penal Law to outline penalties for MWBE fraud. The provisions add two felonies and one misdemeanor to the penal law. The amendment would define MWBE Fraud as knowingly providing materially false information or omitting material information concerning the use or identification of MWBE firms for the purpose of winning a contract award or demonstrating compliance. MWBE Fraud relating to any contract could be a misdemeanor. A finding of fraud relating to a contract in excess of \$50,000 could be a Class E felony. Fraud relating to a contract in excess of \$1,000,000 could be a Class D felony.

12. Proposed Amendments to the Executive Law related to WorkForce Diversity

The Governor’s Budget Proposal would add a new article to the New York State Executive Law to address certain “workforce” diversity goals. The provisions generally work in a similar manner as the MWBE contract rules of Article 15-A, they cover contracts with the same Contracting Agencies (excluding State Funded Entities) and use the same definitions for



BRYANT RABBINO^{LLP}

650 Fifth Avenue, Suite 3300, New York, NY 10019

Tel: 212-967-1800 Fax: 212-967-1811

www.bryantrabbino.com

minorities and women. The provisions require the Contracting Agency to set forth aspirational goals for workforce diversity in performing State Contracts. Contractors are then expected to make good faith efforts to meet such goals (and to cause subcontractors to meet such goals) or to work with the Contracting Agency to establish why meeting the goals is not practical, feasible or appropriate. The Contracting Agency would be prohibited from making awards of State Contracts to a contractor unless the contractor certifies that it will make a good faith effort to meet such goals (unless a waiver is sought and received). The proposal would require periodic reporting of the hours worked by the workforce of the contractor and its subcontractors.

Under the Governor's Budget Proposal, if a contractor or a subcontractor fails to make a good faith effort to meet the aspirational "workforce" diversity goals of the contract, the contractor or subcontractor may be deemed a "non-compliant contractor" by the Contracting Agency. Upon that finding the Contracting Agency shall refer the party to the MWBE Director. In reviewing the determination, the MWBE Director would consider several factors related to such characterization and the contractor's prior history, if any. If the finding is upheld, the contractor or subcontractor could be ineligible to participate on State contracts.

CONCLUSION

If passed into law, the MWBE law reforms in the Governor's Budget will do much to solidify and strengthen what is already a highly successful State program. The changes are necessary to fix problem areas such as the Personal Net Worth test and the process of goal setting. The additions of criminal penalties should enhance the integrity of the program and the addition of the State Funded Entity provisions and the workforce diversity provisions will close the material gaps in the operation of New York State's MWBE program, namely, the previous inapplicability to local entities that perform projects with State appropriations and the diversity of the contractor's own workforce. If adopted, these changes will both enhance business opportunities for MWBEs by making firmly setting the foundation of the program until 2024 and providing important fixes to its current operation.