

Corporate Law Alert: New York State Reauthorizes the Minority and Women Owned Business Enterprise Program for State Contracts

On July 15, 2019, Governor Cuomo signed legislation, S.6575/A.8414, reauthorizing the New York State Minority and Women Owned Business Enterprises (MWBE) program. In addition to extending the MWBE program until 2024, the new law makes several changes to the certification and utilization of MWBEs. The amendments take effect on January 11, 2020.

1. Increase of maximum personal net worth threshold

To ensure that the benefits of MWBE certification are primarily realized by small businesses and minority and women entrepreneurs, the State imposes a personal net worth maximum on MWBE owners. Prior to the reauthorization, certification was limited to MWBEs owned by qualifying individuals with a personal net worth less than three million dollars. The new law vastly alters this requirement by increasing the personal net worth threshold to \$15 million. The statute further permits the Director of the Division of Minority and Women Business Development to establish even higher thresholds for minority group members and women on an “industry-by-industry basis for such industries as the director shall determine.” The law gives the Director broad authority to determine what industries may benefit from the higher threshold and to decide what those amounts will be. The changes reflect that the State is less concerned with ensuring start-up or small business participation, and instead seeks to substantially increase the number of individuals and companies eligible for MWBE certification.

2. Shortening time for the State to act on applications for certification

Applicants for MWBE certification from New York State currently experience extraordinary delays in the processing of their applications. It is not unusual for applicants to wait 18 months or more for the Division to issue a decision. The new law reflects the Legislature’s desire that the Division process applications more quickly. Unfortunately, the amendments do not change the process itself or provide guidance as to how the Division can shorten the application delays.

Under the current law, the Division must provide an applicant notice of the application’s status and inform the applicant of any deficiencies with 30 days of receipt. Once the applicant addresses those deficiencies, the Division then has 60 days to issue a final determination approving or denying the application. The amendment shortens those times to 21 days and 45 days, respectively. However, given the current delays and backlogs afflicting the Division, it seems unlikely that the shortening of this period will have immediate impact.

3. Extension of MWBE Certification from three years to five years

Once an MWBE obtains certification, it must continue to demonstrate its eligibility and reapply for recertification every three years. With the increasing number of applications occasioned by the State's recent emphasis on MWBE participation, the prior three-year recertification period has contributed to administrative delays. The amendment extends the reapplication period out to five years, which the State hopes will lead to less expense and less delay in recertification.

4. Bolstering Statewide MWBE Advocate's role

The law has long contained provisions for a Statewide MWBE Advocate, but to little effect. For at least the past several years, that position has not even been filled. The office was originally designed to provide an avenue for applicants to bring complaints regarding problems and delays in certification. The amendment retains those duties and expands the Advocate's responsibilities. The Advocate is now obligated to conduct periodic audits of agency utilization of MWBEs and is authorized to investigate complaints that agencies are not complying with MWBE requirements. Though the Division has not announced the appointment of an Advocate, the renewed emphasis on its role should provide applicants with an avenue to address delays in applications. Given the length of current application delays and changes in Division criteria, this office should have an important role in helping applicants through the process.

5. Creation of Workforce Diversity Program

The new law creates a Workforce Diversity Program that requires State agencies and those companies that do business with them to take steps to ensure that the contracting workforce meets the State's diversity goals. This program is presently limited to contracts for more than \$100,000 pertaining to the construction or renovation of buildings and real property. As to those contracts, the Director is obligated to set minority and women workforce utilization goals for each construction trade, profession, and occupation. Companies that fail to adhere to those goals or otherwise obtain a waiver from them, may be subject to enforcement activities, such as disqualification of the company's bids or proposals for state work.

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