



MWBE Reauthorization Includes New

Workforce Diversity Requirements

On July 15, 2019, Governor Cuomo signed a law reauthorizing the MWBE requirements for State contracts. That's the requirement that contractors must use "good faith efforts" to allocate a specified percentage of contract dollars to minority-owned businesses (MBE) and woman-owned businesses (WBE). No surprise there, since the current statute was scheduled to expire on December 31, 2019, and must be "refreshed" periodically to

remain constitutionally enforceable. Predictably, the reauthorized law includes a few "upgrades" to the state's MWBE program to enhance opportunities for minority-owned and women-owned businesses to participate in construction contracts let by state agencies and public authorities.

But buried within that reauthorization law is an entirely new regulatory program that, as of January 11, 2020, will now require every contractor within the State to also

make good faith efforts to achieve state-mandated diversity goals within its own workforce, as well as within the workforces of its subcontractors. Many contractors are already familiar with contract terms requiring them to commit to nondiscriminatory hiring practices and to report periodically on the diversity of its workforce. Under the new law, however, they will now be required to meet specific diversity goals or furnish a good explanation for failing to do so.

The new law (Article 28 of



the New York State Executive Law) charges the state Division of Minority & Women’s Business Development (DMWBBD) and the Department of Labor (DOL) with biannually developing “aspirational goals for the utilization of minority group members and women in each

construction trade, profession, and occupation.” Those goals are to be expressed as a percentage of total hours of work to be performed within each trade, profession or occupation expected to be employed in state contracts. Separate participation goals are to be established for each

trade that will be required on the contract for each of the following.

- (i) Black men;
- (ii) Black women;
- (iii) Hispanic men;
- (iv) Hispanic women;
- (v) Native American men;
- (vi) Native American women;

Our Vision:
Building Meaningful Relationships From Coast to Coast





Learn More
About Our
Great Story



Golisano Children's Hospital | Rochester, NY

Contact T.R. Casamento, Business Development Manager
(585) 739 — 4661 | tcasamento@jwdanforth.com

Rochester Skylights, LLC

“Bringing Light & Life To Any Space”





Replacement & New Install / Commercial & Residential
Seven-County VELUX 5-Star Skylight Specialist
VELUX Commercial Modular Sloped Glazing Systems
30% Federal Tax Credit Available on VELUX Solar Skylights

585.377.3330 • rochesterskylights.com




<p>Excavation</p> <ul style="list-style-type: none"> • Clearing • Foundation • Ponds • Storm Water Solutions 	<p>Site</p> <ul style="list-style-type: none"> • Utilities • Storm • Water • Sanitary • Demolition 	<p>Paving</p> <ul style="list-style-type: none"> • Milling • Sweeping • Flushing • Tack Coat • Paving • Crack Sealing • Striping
---	--	--

Fully Insured and Bonded

Phone: 315-904-4420
Website: RoadTekPaving.com
Email: Eugene@RoadTekPaving.com

- (vii) Asian men;
- (viii) Asian women;
- (ix) Caucasian women.

Presumably these goals will be publicized in a format similar to the prevailing rate schedules published each year by the DOL Bureau of Public Work.

With these aspirational goals in place, every state contracting agency will then be required to include in its advertisements for bids or proposals, specific participation goals for each trade, and each protected class, that will be expected to be met on the project. In each case, those percentage goals must be the same aspirational goals published by DMWBD and the DOL, unless the state agency can produce “numerical evidence demonstrating that the application of the aspirational goal would not be practicable, feasible, or appropriate.”

Under current law, successful bidders are required, post-bid, to submit utilization plans showing how they intend to meet project goals for MWBE participation. However, the new workforce diversity law requires every bidder to submit, with its bid, either a detailed waiver request (discussed later in this article) or a certification that it will make good faith efforts to achieve the goals for all trades and classes, including (1) the level of participation it expects to achieve among its own employees (2) a list of its proposed subcontractors, and (3) the participation levels that each subcontractor is expected to achieve. This is problematic because it seems to require a bidder to commit to its subcontractor before it has the job.

If a bidder chooses instead to request a waiver of one or more goals it must still submit with its bid the level of participation that it expects to achieve in its own workforce and in the workforces of its intended (named) subcontractors, and those levels must represent “the maximum feasible participation of minority group members and women in each of the construction trades” required under the contract. It must also submit “numerical evidence setting forth why the achievement of the workforce participation goal is not practical,” along with documentation of the efforts made by the contractor and its subcontractors to promote the inclusion of minority group members and women in their respective workforces for the contract in issue.

If a bidder fails to provide either a sufficient certification or supporting documentation, or a detailed waiver request, it may be given five business days to remedy the deficiency. Otherwise, the contracting agency is prohibited by the new law from awarding the contract to that bidder.

If a bidder’s certification or waiver request is accepted, the contracting agency is then required by law to assure that the contractor makes good faith efforts to achieve its own workforce goals and those of its subcontractors. To that end, the law requires contractors and their subs to



Now accepting applications for:

PAINTERS/PAPER HANGERS

FLAT ROOFERS

STEEP SLOPE ROOFERS




Apply in person:
 1300 Brighton-Henrietta
 Townline Rd.
 Rochester, NY 14623

Great Benefits
 (100% Single Health
 Care, 401K Match,
 Profit Sharing, Life
 Insurance, PTO etc.)







submit utilization reports at least monthly, documenting the hours worked by employees of the contractor and its subcontractors, including “the race, ethnicity, gender, and trade, profession, or occupation of each employee” that performs the work of the contract. Although contractors have been required to file similar reports in the past, they have been mostly for informational purposes. These new reports will be used to monitor compliance with the now-

mandatory participation goals.

If a contractor proves unable, after good faith efforts, to meet the workforce participation goals, or if a subcontractor fails to do so, the contractor may request a partial or total waiver setting forth the reasons for such failure. Acceptable reasons include that there were insufficient minority group members or women available in the construction trades required; or, in the case of a subcontractor, that the contractor periodically monitored the subcontractor’s workforce, notified the subcontractor of deficiencies as they occurred and, nevertheless, was unable to compel the subcontractor’s compliance.

The new law is notably silent as to what the specific penalties are for a contractor’s (or a subcontractor’s) failure to achieve workforce diversity goals once a contract has been awarded. However, based on the precedents that have evolved under the MWBE programs, likely penalties might include back charges, liquidated damages or even contract termination, not to mention the risk of a False Claims Act investigation from the New York State Attorney General’s Office or even a criminal indictment by the U.S.

ERNSTROM & DRESTE LLP

**A Construction and Surety Law Firm
Dedicated to Helping Our Clients
Solve Problems, Minimize Risk, and Realize Success.**



John Drete
Kevin Peartree
Timothy Boldt
Brian Geary
Matthew Holmes

Todd Braggins
Martha Connolly
Nell Hurley
Brian Streicher

(585) 473-3100

ernstromdreste.com

KNOWLEDGE. PASSION. RESULTS.

Attorney's Office for mail fraud or wire fraud.

As noted above, there are obvious impracticalities in what this new law seems to require of contractors on bid day. The law also leaves unaddressed the respective responsibilities of a union contractor and the labor unions with which he or she is a signatory to assure that union work crews achieve the level of diversity required under particular state contracts.

It's also unclear how and when the affected State Agencies will carry out their responsibilities under the new law. The DMWBD is supposed to post the aspirational goals by trade and protected class by October 1 of each year, but that hasn't happened yet. And it is unclear

how state contracting agencies will proceed to set project targets if the "aspirational goals" aren't in place by January 11, 2020 when the law takes effect.

As this article was being written, neither the state Division of Minority & Women's Business Development nor the State Department of Labor have published any guidance on how this new law will be interpreted or applied. Nor was any information available from either agency by phone inquiries to their central offices in New York City and Albany.

Come January 11, 2020, prospective bidders on state contracts need to read the front-end documents carefully, to identify

how the new workforce diversity mandates are being applied. In fact, it would be wise to inquire carefully of each state agency and public authority what the ground rules will be regarding this issue before leaping into the next contract with that agency or authority.

Adams Leclair LLP is a litigation law firm based in Rochester, New York focused on commercial and construction advocacy. The team of attorneys can provide specialized counsel on contract issues and state regulations.

Contact Adams Leclair LLP at 585-327-4100 or Tony Adams aadams@adamsleclair.law



It's about so much more than Insurance Policies...at Haylor, Freyer & Coon we understand the uniqueness of Construction Risk Management!

- **Dedicated Construction Team**
- **Strong Carriers Relationships**
- **Powerful Negotiations On Your Behalf**
- **Creative Solutions**
- **Assistance With Sub-contractor Risk Management**
- **Your Trusted Advisor**

Contact Cindy Bostley, CRIS, CIC
cbostley@haylor.com
585-641-7028

