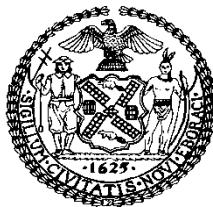


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THE COUNCIL OF THE CITY OF NEW YORK

Committee Report of the Governmental Affairs and Human Services Division
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COMMITTEE ON CONTRACTS
Hon. Helen Rosenthal, Chair

COMMITTEE ON SMALL BUSINESS
Hon. Robert Cornegy, Chair

COMMITTEE ON WOMEN'S ISSUES
Hon. Laurie Cumbo, Chair

December 14, 2015

Oversight: Implementation of the City's Minority and Women-Owned Business Enterprises Program

INT. NO. 923: By Council Members Cumbo, Cornegy, Rosenthal, Chin, Eugene, Gentile, Koo, Rose, Williams and Dickens

TITLE: A Local Law in relation to requiring the department of small business services to submit an annual report regarding the satisfaction of M/WBE requirements by recipients of economic development benefits who contract with the economic developmental corporation.

INT. NO. 976: By Public Advocate James and Council Members Chin, Gentile, King, Mendez, Palma, Richards, Rose and Dickens

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to requiring training for agency chief contracting officers and agency M/WBE officers and posting relating information on the City's website.

INT. NO. 981-A: By Council Members Cumbo, Public Advocate James, Rosenthal, Crowley, Cornegy, Arroyo, Chin, Dickens, Eugene, Gibson, Koo, Rose and Wills

TITLE: A Local Law in relation to the creation of an advisory board to enhance procurement opportunities for minority and women-owned businesses.

INT. NO. 1005: By Council Members Crowley, Mealy, Cumbo, Rosenthal, Cornegy, Chin, Gentile, King, Koslowitz, Rose and Wills.

TITLE: A Local Law to amend the administrative code of the city of New York, in relation to requiring agency minority and women-owned business enterprise utilization plans to be published online.

INT. NO. 1019: By Council Member Rosenthal

TITLE: A Local Law to amend the Administrative Code of the City of New York, in relation to amending reporting requirements related to MWBE participation.

INT. NO. 1020:	By Council Member Rosenthal
TITLE:	A Local Law to amend the Administrative Code of the City of New York, in relation to amending reporting requirements and agency goals related to MWBE participation.
INT. NO. 1021-A:	By Council Member Rosenthal, Cornegy and Crowley
TITLE:	A Local Law to amend the Administrative Code of the City of New York, in relation to requiring a minority and women-owned business enterprise consultant for city projects with budgets in excess of ten million dollars.
RESO. NO. 923:	By Council Member Rosenthal
TITLE:	A resolution adopting the rule amendment of the Procurement Policy Board to raise the micropurchase limit for the procurement and award of construction contracts to \$35,000.

I. INTRODUCTION

On December 14, 2015, the Committee on Contracts, chaired by Council Member Helen Rosenthal, the Committee on Small Business, chaired by Council Member Robert Cornegy, and the Committee on Women's Issues, chaired by Council Member Laurie Cumbo, will hold an oversight hearing on the implementation of the City's minority and women-owned business enterprises ("M/WBE") program. Specifically, the Committees are interested in exploring issues related to the program since the passage of Local Law 1 of 2013, which made several amendments to the program in order to increase its success. Those invited to testify include, the Mayor's Office of Contracting Services ("MOCS"), the Department of Small Business Services ("SBS"), and other interested parties.

II. BACKGROUND

A. Local Law 129 of 2005

In 2005, the City conducted a study that revealed significant demographic disparities among the business owners with whom the City contracts for purposes of receiving various goods and services. The study revealed that the City contracts with M/WBEs at drastically lower rates than businesses not owned by women or minorities.¹ Further, the study examined the number of MWBEs that operate in the city compared to their rates of procurement of government contracts and found substantial underutilization.² The study revealed that M/WBEs were underutilized in the awarding of both prime contracts and subcontracts.³ Accordingly, that same year, the Council passed Local Law 129 of 2005, which created the City's M/WBE program.⁴ The purpose of the M/WBE program is to increase and expand city contracting opportunities for M/WBEs.⁵

Local Law 129 set aspirational goals for City agencies to increase their contracting with MWBEs. These goals set target percentages for certain types of contracts⁶, but initially, the law only applied to contracts valued at \$1 million or less. Significantly, Local Law 129 created an

¹ *City of New York Disparity Study*. New York: Mason Tillman Associates, 2005 available at <http://masontillman.com/sites/masontillman.com/files/attachments/1312%20City%20of%20New%20York%20Final%20REPORT%201-24-05.pdf> (last visited December 1, 2015).

² *Id.* at 10-4.

³ *Id.*

⁴ See Local Law 129 of 2005.

⁵ According to [insert source], in order to qualify for M/WBE certification, a firm must: (1) have been in operation for at least one year; (2) be at least 51 percent owned, operated and controlled by a woman or a member of a recognized minority group; and (3) be located within the five boroughs or, if located in any of the surrounding counties, derive 25 percent of its business from the City. See: <https://www1.nyc.gov/nycbusiness/description/minority-and-womenowned-business-enterprise-certification-program-mwbe> (last visited December 1, 2015).

⁶ Pursuant to *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), a United States Supreme Court case, a municipality may only create a race-based program if it demonstrates historical and societal discrimination against minority businesses. In compliance with this decision, the participation goals for this program were established as a result of a disparity study conducted by the City that examined the availability of M/WBEs as compared to their utilization in public contracting.

M/WBE certification program⁷, which provides greater access to information about contracting opportunities through classes, networking events, targeted solicitations, and includes an online directory for certified businesses within the City that promotes M/WBE businesses to purchasers.⁸

After the program's creation, certified M/WBE firms had won more than three billion dollars in City contracts by 2012.⁹ Notwithstanding the successes of the M/WBE program under Local Law 129, amendments were later made to strengthen the program, which included further expanding the mechanisms and strategies the City could use to increase M/WBE procurement.¹⁰

B. Local Law 1 of 2013

In 2013, the Council made efforts to improve Local Law 129 by passing Local Law 1 of 2013.¹¹ Local Law 1 made a number of significant changes to the city's M/WBE program, including: (i) removing the requirement that M/WBE goals only apply to contracts valued at one million dollars or less; (ii) the creation of "M/WBE stat," an accountability program that requires agency M/WBE officers to convene quarterly to discuss progress with reaching M/WBE goals; (iii) requiring M/WBE reports from MOCS on a quarterly basis instead of semi-annually (as was required under Local Law 129 of 2005); and (iv) overall, improving and increasing education and outreach regarding the MWBE program and city contracting.¹²

⁷ See eligibility requirements for MWBE certification available at <https://www1.nyc.gov/nycbusiness/description/minority-and-womenowned-business-enterprise-certification-program-mwbe> (last visited December 1, 2015).

⁸ Minority and Women-owned Business Enterprise (M/WBE) Certification Program *The Official Website of the City of New York* available at <https://www1.nyc.gov/nycbusiness/description/minority-and-womenowned-business-enterprise-certification-program-mwbe> (last visited December 1, 2015).

⁹ "Mayor Bloomberg Signs Legislation to Help Strengthen Minority and Women-Owned Business Enterprise Program." *The Official Website of the City of New York*. 07 Jan. 2013. <http://www1.nyc.gov/office-of-the-mayor/news/011-13/mayor-bloomberg-signs-legislation-help-strengthen-minority-women-owned-business-enterprise> (last visited December 1, 2015).

¹⁰ See Local Law 1 of 2013.

¹¹ See Local Law 1 of 2013.

¹² *Id.*

C. Issues and Concerns Regarding the City's M/WBE Program

Despite New York City being home to the largest and most diverse population of businesses in the United States¹³, M/WBEs were only awarded 5.3% of the City's \$13.8 billion procurement budget in fiscal year 2015.¹⁴ Based on continued underutilization, advocates and public officials have expressed a variety of concerns regarding the City's contracting rates with M/WBEs and have raised issues about the City's program. These concerns include continued barriers specific to M/WBEs¹⁵, the City's failure to meet program participation goals¹⁶, and fraud and misuse of the M/WBE program.¹⁷

The Black Institute's ("TBI") report, "Not Good Enough: The Myth of Good Faith and Bad Efforts," released in April 2015, illustrates challenges M/WBEs face when trying to contract with the City.¹⁸ TBI suggests that the barriers M/WBEs experience include but are not limited to securing start-up capital,¹⁹ racial and gender bias,²⁰ a difficult M/WBE certification process,²¹ a lack of sufficient information tools for M/WBEs to compete for government contracts,²² and delays²³ in payments from contracting agencies.²⁴ Further, the report raises the issue that among

¹³ "Making the Grade: New York City Agency Report Card On Minority/Women-Owned Business Enterprises." *The Office of the New York City Comptroller*. June 2015 available at http://comptroller.nyc.gov/wp-content/uploads/documents/Making_the_Grade_2015.pdf (last visited December 1, 2015).

¹⁴ *Id.*

¹⁵ The Black Institute, "Not Good Enough: The Myth of Good Faith and Bad" 2015, available at https://d3n8a8pro7vhmx.cloudfront.net/theblackinstitute/pages/352/attachments/original/1428411258/TBI_MWBE_Report_040215_FINAL.pdf?1428411258 pg 32 (last visited December 1, 2015).

¹⁶ See *supra* note 11.

¹⁶ *Id.* at 1.

¹⁷ Vance, Cyrus R. "Report of the Grand Jury of the Supreme Court State of New York First Judicial District Issued Pursuant to Criminal Procedure Law Section 190.85 Subdivision (1) (c)" November 2014 available at <http://manhattanda.org/sites/default/files/MWBE%20Grand%20Jury%20Report.pdf> (last visited December 1, 2015).

¹⁸ See *supra* note 12.

¹⁹ *Id.* at 33.

²⁰ *Id.* at 34.

²¹ *Id.* at 35.

²² *Id.*

²³ It is important to note that although delays in payments do not only apply to M/WBEs, many M/WBEs are smaller companies, and as such, delays in payments have a larger impact on their ability to continue on with their daily business activities.

²⁴ *Id.* at 36.

women, women of color seem to face these challenges on a larger scale than white women, who typically have more access to resources and startup capital than women of color.²⁵

i. Struggles Meeting M/WBE Participation Goals

In 2014, the New York City Comptroller began publishing the “Making the Grade” report (“Making the Grade”) to assess the 32 mayoral agencies’ M/WBE procurement.²⁶ According to “Making the Grade,” the City received an overall grade of “D+ in 2015,” which was an improvement from the “D” grade²⁷ the City received in 2014.²⁸ Of the 32 mayoral agencies, 13 received a “C” grade, 14 received a “D,” and three agencies received an “F,” including SBS.²⁹ Only one agency, the Department of Housing Preservation and Development, received an “A.”³⁰ Overall, eight agencies received a higher grade in 2015 than in 2014, while four declined and 20 remained the same.³¹ According to the Comptroller’s office, while these scores were exceptionally low, the slight increases from 2014 to 2015 were evidence of a renewed focus by agencies on M/WBE procurement.³²

ii. Fraud and Misuse of M/WBE Program

Fraud and misuse of the City’s M/WBE program have had a detrimental effect on the City’s M/WBE program. For instance, on November 24, 2014 Cyrus R. Vance, Jr., the District Attorney for New York County, announced the release of a Grand Jury’s report regarding the investigation of prime contractors and subcontractors in the construction industry.³³ The

²⁵ *Id.* at 37.

²⁶ *Id.* at 1.

²⁷ Grades issues are based on actual dollars spent, not contracted spending, where the anticipated amount may or may not change for future projects. *Id.* at 3.

²⁸ *Id.* at 1.

²⁹ *Id.* at 5.

³⁰ *Id.*

³¹ *Id.* at 6.

³² *Id.*

³³ See *supra* note 14 .

investigation revealed fraudulent criminal conduct by both M/WBEs and non-M/WBEs³⁴. This fraudulent behavior included: (i) Prime contractors filing documents with agencies that falsely represented that a M/WBE performed work even though the M/WBE did not actually perform the work and clearly did not have the capacity to perform the work³⁵; (ii) M/WBEs billing for work done by non-M/WBEs, receiving the payments for the work and then funneling the payments to the non-MWBE that actually performed the work³⁶; (iii) prime contractors contracting for materials with a non-M/WBE, but including contact information of a M/WBE on the paperwork documenting the shipment and delivery of the materials³⁷; and (iv) M/WBEs obtaining contracts as a prime contractor to simply operate as a “front” for non-M/WBEs (for example, a male-owned company would arrange for a female friend or relative to certify as a woman owned business in order to be awarded a contract, but a non-M/WBE would perform the contract and receive payment).

Based on its findings, the Grand Jury returned an indictment charging a scheme to defraud³⁸ and ten counts of *offering a false instrument for filing* in the first degree.³⁹ The investigation is ongoing. The Grand Jury offered the following recommendations to prevent fraud in M/WBE procurement:

- Require a representative with knowledge from the prime contractor and from each M/WBE on a contract to certify on penalty of perjury to the contracting agencies that the M/WBE performed the services or provided the materials, and that the M/WBE was not just a “pass-through” entity;
- Increase the resources of certifying and contracting agencies to oversee the M/WBE programs (e.g. creating an electronic database of all applications that can be

³⁴ *Id.*

³⁵ *Id.*

³⁶ Significantly, the fraudulent scheme hurt the City and taxpayers because an extra charge would be included as a “fee” for the MWBE that acted as a “pass through” entity. The non-MWBE would provide an invoice to the MWBE, who would generate a second invoice that included the fee. The fees typically ranged from 2% to 4%.

³⁷ See *supra* note 14.

³⁸ Penal Law §190.65(1)(b).

³⁹ Penal Law §175.35.

searchable by all agencies and more auditing in the form of onsite inspections and spot-checks at job sites);

- Add gradations to the scheme-to-defraud statute, Penal Law §190.65, so that the criminal charge reflects the magnitude of the offense; and
- Enhance existing criminal fines for such fraud to take away the profit incentive; i.e. increase the dollar amounts to make them proportional to the crime, or make the fine the equivalent or some multiple of the amount that was supposed to go to a M/WBE.⁴⁰

While abuse and fraud pose challenges to M/WBEs and undermine the credibility of existing regulations, recommendations on how crimes related to M/WBE fraud should be handled differ.⁴¹ The Grand Jury recommendations have called for aggressive criminal charges, including the enhanced ability for prosecutors to pursue individuals as opposed to contracting companies for M/WBE fraud, and significant increases in potential prison terms.⁴²

While some argue that the criminal justice system may mitigate fraud, others believe that the further criminalizing of M/WBE fraud may have unintended consequences.⁴³ Members of the law firm Sutherland, Asbill & Brennan, active in New York and Atlanta, have argued that further criminalization of M/WBE-related fraud may have unintended consequences, such as government officials' reluctance to certify M/WBEs, as "certifying individuals would be taking on a significant and highly risky obligation."⁴⁴ In their view, the Grand Jury's proposals are "a

⁴⁰ Vance, Cyrus "DA Vance: Grand Jury Report Recommends Significant Reforms to Assist Minority-And Women-Owned Businesses" *The New York County District Attorney's Office* 24, November 2015 available at <http://manhattanda.org/press-release/da-vance-grand-jury-report-recommends-significant-reforms-assist-minority-and-women-ow> (last visited December 1, 2015).

⁴¹ Danny III, Lawrence A and Gorham, Patricia A, "Criminalizing Fraud In Minority-and-Women-Owned Business Certification" *Sutherland* 9 February 2015 available at <http://www.sutherland.com/portalresource/lookup/poid/Z1tO19NPluKPtDNIqLMRV56Pab6TfzcRXncKbDtRr9tObDdEnG3CnO3!/fileUpload.name=/070021514Sutherland.pdf> (last visited December 1, 2015).

⁴² *Id.* at 1.

⁴³ See *supra* note 29 at 39.

⁴⁴ Danny III, Lawrence A and Gorham, Patricia A. "Criminalizing Fraud in Minority-and-Women-Business Certification" *New York Law Journal* 9 February 2015 available at <http://www.newyorklawjournal.com/id=1202717100476/Criminalizing-Fraud-in-Minority-and-WomenOwned-Business-Certification> (last visited December 1, 2015).

heavy-handed reaction to what is at heart a failure to effectively administer a government program.”⁴⁵

D. Efforts to Address Issues Involving M/WBE Program

In September of 2015, Mayor Bill de Blasio announced that New York City awarded over \$1.6 billion in contracts to M/WBEs in fiscal year 2015.⁴⁶ The Administration contends that it is working to achieve its goal of awarding \$16 billion in M/WBE contracts over a ten-year period.⁴⁷ However, the Administration has publically recognized the challenges the City has faced with increasing M/WBE procurement and contends that these challenges are a result of the restrictions in the State’s General Municipal Law related to contracting with the “lowest responsible bidder.”⁴⁸

At *City & State*’s annual “On Diversity Conference,” held on September 24, 2015, Maya Wiley, Director of the City’s M/WBE initiative, explained that such legal barriers hamper the agencies’ ability to meet their M/WBE procurement goals.⁴⁹ As a response to this issue, on May

⁴⁵ *Id.*

⁴⁶ De Blasio Administration Announces Over \$1.6 Billion in Minority and Women-Owned Business Enterprise.” *The Official Website of the City of New York*. 28 Sept. 2015 available at <http://www1.nyc.gov/office-of-the-mayor/news/652-15/de-blasio-administration-over-1-6-billion-minority-women-owned-business> (Last visited December 1, 2015)

⁴⁷ *Id.*

⁴⁸ Pursuant to N.Y. General Municipal Law § 103: generally, “all contracts for public work involving an expenditure of more than [\$35,000] and all purchase contracts involving an expenditure of more than [\$20,000], shall be awarded . . . to the lowest responsible bidder furnishing the required security after advertisement for sealed bids . . . provided, however, that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value,” as defined by the state finance law if permitted by local law. If the City had more discretion to determine who it would contract with, it would allow the City to award contracts to qualified M/WBEs more often. However, because of the lowest responsible bidder requirement, the City cannot award a contract to an M/WBE if it is not the lowest bidder, even if awarding the contract to an M/WBE would achieve more equal distribution of economic opportunity in the City. See N.Y. GML § 103.

⁴⁹ Lentz, Jon. “Law Makers, Advocates Call for Legislation to Expand MWBE Contracting” *City&State* 24 Sept. 2015 available at <http://cityandstateny.com/articles/politics/new-york-city/lawmakers,-advocates-call-for-legislation-to-expand-mwbe-contracting.html#.VIMzbtKrTcs> (last visited December 1, 2015).

15, 2015, Mayor Bill de Blasio announced that the Administration would push the State legislature to amend State law to permit the City to make necessary changes to its M/WBE program. The Mayor contends that such changes would increase M/WBE procurement and include raising thresholds for discretionary spending, expanding the use of ‘best value’ procurement⁵⁰, and expanding the usage of M/WBE-related pre-qualified lists to all industries.⁵¹

In an effort to improve the City’s M/WBE program and mitigate some of the barriers faced by M/WBEs, the Committees look forward to discussing the Administration’s plans to meet program goals and considering legislation that would amend the program.

III. ANALYSIS OF LEGISLATION

Int. No. 923

Currently, the Economic Development Corporation (“EDC”) is the entity under contract with the Department of Small Business Services (“SBS”) to administer economic development benefits on behalf of the City. Int. No. 923 would amend the New York City Charter to require EDC to annually evaluate whether its contractors met M/WBE participation goals and submit its findings to SBS. Int. No. 923 would also require SBS to submit a report to the Mayor and the Speaker with the following information: (i) a list of all recipients of economic development benefits; (ii) the M/WBE subcontracting requirements for these recipients and their subcontractors, where applicable; (iii) whether the recipient and each subcontractor fully

⁵⁰ Pursuant to N.Y. State Finance Law § 163, "Best value" means the basis for awarding contracts for services to the offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall reflect, wherever possible, objective and quantifiable analysis. Such basis may also identify a quantitative factor for offerers that are small businesses or certified minority- or women-owned business enterprises as defined in subdivisions one, seven, fifteen and twenty of section three hundred ten of the executive law to be used in evaluation of offers for awarding of contracts for services.

⁵¹ De Blasio Administration to Seek Amendments to State Law Help Increase Contracting to Minority and Women-Owned Businesses *The Official Website of the City of New York*. 15 May 2015 available at <http://www1.nyc.gov/office-of-the-mayor/news/315-15/de-blasio-administration-seek-amendments-state-law-help-increase-contracting-minority> (last visited December 1, 2015).

complied with the M/WBE contracting requirements; and (iv) if M/WBE contracting requirements were not met by a recipient or subcontractor, a detailed description of the reason for non-compliance.

Int. No. 923 would take effect immediately upon enactment.

Int. No. 976

Pursuant to the New York City Administrative Code § 6-129, each agency has an agency chief contracting officer (“ACCO”) (who is responsible for organizing and supervising the agency’s procurement activity⁵²) and an agency M/WBE officer (who is directly accountable to the agency head concerning the agency’s M/WBE contacting responsibilities⁵³). Int. No. 976 would amend the Administrative Code to require ACCOs and M/WBE officers to undergo mandatory trainings on or before 60 days of being hired, and every two years after the first training. Int. No. 976 would require SBS to conduct, coordinate, and facilitate the trainings and post a list of contact information for all ACCOs and their last training date on its website.

Int. No. 976 would take effect 120 days upon enactment.

Proposed Int. No. 981-A

The City’s M/WBE law, embodied in Administrative Code § 6-129, requires the Mayor to designate an individual to oversee the City’s M/WBE procurement.⁵⁴ Currently, Counsel to the Mayor serves as the director required under the law.⁵⁵ However, such Counsel is also responsible for counseling the Mayor on various other legal aspects of policy and administrative

⁵² NYC Admin Code § 6-129(c)(2).

⁵³ NYC Admin Code § 6-129(f).

⁵⁴ Admin Code § 6-129(c)(14); *see also* Admin Code § 6-129(f-h)(l-m).

⁵⁵ See <http://www1.nyc.gov/office-of-the-mayor/maya-wiley.page> (last visited on December 11, 2015).

matters such as expanding affordable broadband access across the five boroughs.⁵⁶ The M/WBE director also serves as the Mayor's liaison to the Mayor's Advisory Committee on the Judiciary, and serves on the City's Procurement Policy Board and the Board of the Fund for the City of New York.⁵⁷

Proposed Int. No. 981-A would amend the Administrative Code to further require the Mayor to appoint a director whose sole responsibility is to focus on M/WBE procurement. Proposed Int. No. 981-A would also create an advisory board to enhance procurement opportunities in the City for M/WBEs. The advisory board would consist of 13 members appointed by the Mayor, the Speaker of the Council, the Public Advocate, and the Comptroller within 60 days of the enactment of Proposed Int. No. 981-A. The City's Chief Procurement Officer, the commissioner of SBS and the above-referenced M/WBE director would also be members of the advisory board.

Further, Proposed Int. No. 981-A would require such advisory board to submit an annual report the Mayor and the Speaker of the Council with the following information: (i) a detailed summary of the advisory board's overall findings related to challenges city agencies face with M/WBE procurement; (ii) a detailed summary of the information gathered during public meetings held pursuant to the law if it passes; (iii) whether or not each city agency met M/WBE procurement goals over the past year and for those agencies that did not meet such goals, a detailed description of the challenges that prevented the agency from meeting its M/WBE goals and, where applicable, such challenges shall be disaggregated by area of procurement, for example construction, and goods and other services; (iv) a detailed description of tools, processes, and strategies that were successfully utilized to help each agency in its M/WBE

⁵⁶ *Id.*

⁵⁷ *Id.*

procurement efforts; and (v) recommendations, including, but not limited to, specific actions each agency should take to meet the City's M/WBE procurement goals.

Proposed Int. No. 981-A would take effect immediately upon enactment.

Int. No. 1005

Currently, Administrative Code § 6-129(g) requires each agency that made more than \$5 million in procurements in the previous fiscal year to submit an agency utilization plan⁵⁸ for the following fiscal year to SBS.⁵⁹ Upon approval from SBS, the agency must then submit a copy of the utilization plan to the Speaker of the Council.⁶⁰ Int. No. 1005 would amend the Administrative Code to require SBS to publish a copy of each approved utilization plan on its website.

Int. No. 1005 would take effect immediately upon enactment.

Int. No. 1019

Int. No. 1019 would amend the Administrative Code and thereby alter the reporting requirements of Local Law 1 by requiring quarterly compliance reports to the Speaker of the

⁵⁸ Each agency utilization plan must, at minimum, include:

- (a) the agency's participation goals for MBEs, WBEs and EBEs for the year, provided however, that when setting its goals, each agency shall consider the citywide goals, the size and nature of its own procurement portfolio (excluding contracts described in paragraph two of subdivision q of this section), and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year;
- (b) an explanation for any agency goal that is different than the participation goal for the relevant group and industry classification as determined pursuant to subdivision d of this section;
- (c) a list of the names and titles of agency personnel responsible for implementation of the agency utilization plan;
- (d) methods and relevant activities proposed for achieving the agency's participation goals; and
- (e) any other information which the agency or the commissioner deems relevant or necessary.

See NYC Admin Code 6-129(g)(1).

⁵⁹ NYC Admin Code § 6-129(g).

⁶⁰ *Id.*

Council, for all contracts awarded, disaggregate information reported by (i) status as MBE, WBE, EBE or non-certified firm; (ii) minority and gender group; and (iii) certification as both MBE and WBE. Int. No. 1019 would remove the requirement that such information be reported only for contracts for which an agency set participation goals.⁶¹

Int. No. 1019 would take effect immediately upon enactment.

Int. No. 1020

The M/WBE laws embodied in Administrative Code § 6-129 require detailed reporting on the full or partial waivers of participation requirements for contracts, including the determination made and the number and dollar amount of the contracts, classified by industry.⁶² Administrative Code § 6-129 also requires detailed reporting on all solicitations submitted to the city chief procurement officer, including what determination was made.⁶³ Int. No. 1020 would amend the existing law by removing the requirement that quarterly compliance reports include an itemized list for such contracts. Int. No. 1020 would only require quarterly compliance reports to include the number of requests for full or partial waivers and the number of solicitations submitted to the city chief procurement officer.

Currently, agency procurement plans are due by July 31st of each year, and agency utilization plans are due by April 1st.⁶⁴ However, there is potential value in having agencies formulate their utilization plans by considering their procurement plans. Therefore, Int. No. 1020 would amend the date on which agency utilization plans are due from April 1 to July 1, and

⁶¹ NYC Admin Code § 6-129(l)(1)(b).

⁶² NYC Admin Code § 6-129(l)(1)(b)(iv).

⁶³ NYC Admin Code § 6-129(l)(1)(h).

⁶⁴ NYC Admin Code § 6-129(g)(1) and NYC Admin Code § 6-129(g)(5).

amend the date on which agency procurement plans must be published online from July 31 to April 1.

Int. No. 1020 would also remove the requirement that agencies set their utilization goals by dollar amount. Finally, Int. No. 1020 would amend the date on which an agency that fails to achieve its utilization goals is required to submit a performance improvement plan from October 1 to January 31.

Int. No. 1020 would take effect immediately upon enactment.

Proposed Int. No. 1021-A

Proposed Int. No. 1021-A would amend the Administrative Code to require that every agency that awards a contract with M/WBE participation goals and a budget in excess of \$10 million must hire an independent consultant to assist with the recruitment of M/WBE subcontractors, monitor the prime contractor's compliance with M/WBE participation goals, and report on the prime contractor's performance with meeting such goals. Proposed Int. No. 1021-A would require the prime contractor for such contracts to pay all costs associated with the independent consultant.

Proposed Int. No. 1021-A would take effect 120 days upon enactment.

Res. No. 923

Pursuant to the Charter, in order to establish dollar limits for procurements made without competition or public advertisement, the Procurement Policy Board ("PPB") and the Council must act concurrently.⁶⁵ On October 21, 2015, the PPB adopted a rule to raise the micropurchase limit for procurements of construction under Section 3-08 of the PPB Rules, for which no

⁶⁵ NYC Charter § 314.

competition is required, from twenty thousand dollars (\$20,000) to thirty-five thousand dollars (\$35,000). Res. No. 923 would constitute the concurrent action necessary for the PPB rule change to take effect.

Int. No. 923

By Council Members Cumbo, Cornegy, Rosenthal, Chin, Eugene, Gentile, Koo, Rose, Williams and Dickens

A Local Law in relation to requiring the department of small business services to submit an annual report regarding the satisfaction of MWBE requirements by recipients of economic development benefits who contract with the economic development corporation

Be it enacted by the Council as follows:

Section 1. Section 1301 of chapter 56 of the New York city charter is amended by adding a new subdivision b-2 to read as follows:

b-2. By March 1, 2016, and by March 1 every year thereafter, the entity under contract with the department to provide or administer economic development benefits on behalf of the city shall assess and evaluate each of its contractors to determine whether they complied with minority and women-owned business subcontracting requirements, if any, pursuant to the contract. The findings of such assessments shall be submitted to the department on or before June 1, 2016, and on June 1 every year thereafter. By September 1, 2016, and by September 1 every year thereafter, the department shall submit a report on such assessment and evaluation to the mayor and the speaker of the council, which shall include, but not be limited to: (i) a list of all recipients of economic development benefits; (ii) the minority and women-owned business subcontracting requirements for these recipients and their subcontractors, where applicable; (iii) whether the recipient and each subcontractor fully complied with the minority and women-owned business contracting requirements; and (iv) if minority and women-owned business contracting requirements were not met by a recipient or subcontractor, a detailed description of the reason for non-compliance.

§2. This local law shall take effect immediately.

ASB
LS #5192
8/5/2015

Proposed Int. No. 981-A

By Council Members Cumbo, the Public Advocate (Ms. James), Rosenthal, Crowley, Cornegy, Arroyo, Chin, Dickens, Eugene, Gibson, Koo, Rose and Wills

A Local Law In relation to the creation of an advisory board to enhance procurement opportunities for minority and women-owned businesses

Be it enacted by the Council as follows:

Section 1. Paragraph 14 of subdivision c of section 6-129 of the administrative code of the city of New York is amended to read as follows:

(14) "Director" means an individual designated by the mayor whose sole role is to perform the oversight functions of the director described in this section, who either reports directly to the mayor or is a commissioner.

§ 2. Section 6-129 of the administrative code of the city of New York is amended to add subdivision s to read as follows:

Advisory Board. Advisory board to enhance procurement opportunities for minority and women-owned businesses. There shall be an advisory board to enhance procurement opportunities for minority and women-owned businesses. (1) Such advisory board shall:

(i) study and evaluate the effectiveness of each city agency's efforts to achieve minority and women-owned business procurement goals;

(ii) conduct a public meeting in each borough regarding challenges minority and women-owned businesses face in the procurement process;

(iii) identify each city agency's unique challenges in achieving minority and women-owned business procurement goals; and

(iv) provide recommendations in a report that shall include, but not be limited to, specific actions each agency should take to improve and increase its minority and women-owned business procurement.

(2) Such advisory board shall consist of the following 13 members:

(i) three members shall be appointed by the mayor, provided that at least one such member shall be an employee, member or director of, or otherwise affiliated with, an organization that provides services and assistance to minority and women-owned businesses for the purpose of procuring contracts with the city;

(ii) three members shall be appointed by the speaker of the council, provided that at least one such member shall be an employee, member or director of, or otherwise affiliated with, an organization that provides services and assistance to minority and women-owned businesses for the purpose of procuring contracts with the city; and

(iii) two members shall be appointed by the public advocate, provided that at least one such member shall be an employee, member or director of, or otherwise affiliated with, an organization that provides services and assistance to minority and women-owned businesses for the purpose of procuring contracts with the city;

(iv) two members shall be appointed by the comptroller, provided that at least one such member shall be an employee, member or director of, or otherwise affiliated with, an organization that provides services and assistance to minority and women-owned businesses for the purpose of procuring contracts with the city;

(v) the chief procurement officer;

(vi) the director; and

(vii) the commissioner of the department of small business services.

The members of the advisory board who are appointed by the mayor, speaker of the council, the public advocate, and the comptroller pursuant to paragraph 2 of this subdivision shall be appointed within 60 days of the enactment of this local law. Any vacancy in the membership of the advisory board shall be filled in the same manner as the original appointment.
Members of the advisory board shall serve without compensation and shall meet no less frequently than once per quarter.

(3) No later than one year after the effective date of this local law, and on or before October 1 every year thereafter, the advisory board shall submit to the mayor and the speaker of the council a report that shall include the findings and recommendations of the advisory board.
Such report shall include, but not be limited to, the following:

- (i) a detailed summary of the advisory board's overall findings related to challenges city agencies face with minority and business-owned business procurement;
- (ii) a detailed summary of the information gathered during the public meetings held pursuant to paragraph 1 of this subdivision;
- (iii) whether or not each city agency met minority and women-owned business procurement goals over the past year and for those agencies that did not meet such goals, a detailed description of the challenges that prevented the agency from meeting minority and women-owned business procurement goals and, where applicable, such challenges shall be disaggregated by area of procurement, for example construction, and goods and other services;
- (iv) A detailed description of tools, processes, and strategies that were successfully utilized to help each agency in its minority and women-owned business procurement efforts; and
- (v) Recommendations, including, but not limited to, specific actions each agency should take to meet the city's minority and women-owned business procurement goals.

§ 3. This local law shall take effect immediately upon enactment.

ASB
LS 3580
7/31/2015

Int. No. 1005

By Council Members Crowley, Mealy, Cumbo, Rosenthal, Corney, Chin, Gentile, King, Koslowitz, Rose and Wills

A Local Law to amend the administrative code of the city of New York, in relation to requiring agency minority and women-owned business enterprise utilization plans to be published online

Be it enacted by the Council as follows:

Section 1. Paragraph 1 of subdivision g of section 6-129 of the administrative code of the city of New York is amended to read as follows:

(1) Beginning May 15, 2006, and on April 1 of each year thereafter, each agency which, during the fiscal year which ended on June 30 of the preceding year, has made procurements in excess of five million dollars, without counting procurements that are exempt pursuant to paragraph two of subdivision q of this section, shall submit an agency utilization plan for the fiscal year commencing in July of the year when such plan is to be submitted to the commissioner. Upon approval by the commissioner, such plan shall be submitted to the speaker of the council, and shall be published on the division's website. Each such plan shall, at a minimum, include the following:

(a) the agency's participation goals for MBEs, WBEs and EBEs for the year, provided however, that when setting its goals, each agency shall consider the citywide goals, the size and nature of its own procurement portfolio (excluding contracts described in paragraph two of subdivision q of this section), and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year;

(b) An explanation for any agency goal that is different than the participation goal for the relevant group and industry classification as determined pursuant to subdivision d of this section;

- (c) A list of the names and titles of agency personnel responsible for implementation of the agency utilization plan;
- (d) Methods and relevant activities proposed for achieving the agency's participation goals; and
- (e) Any other information which the agency or the commissioner deems relevant or necessary.

§ 2. This local law shall take effect immediately upon enactment.

ASB
LS 6104
11/10/2015

Int. No.1019

By Council Member Rosenthal, Chin, Johnson, Koo, Mendez and Rose

A Local Law to amend the administrative code of the city of New York, in relation to amending reporting requirements related to M/WBE participation

Be it enacted by the Council as follows:

1 Section 1. Subparagraph a of paragraph 1 of subdivision 1 of section 6-129 of the
2 administrative code of the city of New York, as amended by local law number 1 for the year
3 2013, is amended to read as follows:

4 (a) the number and total dollar value of contracts awarded, disaggregated by industry
5 classification [and], size of contract[,] and status as MBE, WBE, EBE, or non-certified firm, and
6 further disaggregated by minority and gender group, and the number and dollar value of such
7 contracts that were awarded to firms that are certified both as MBEs and WBEs, including but
8 not limited to, contracts valued at or below twenty thousand dollars, contracts valued above
9 twenty thousand dollars and at or below one hundred thousand dollars, contracts valued above
10 one hundred thousand dollars and at or below one million dollars, contracts valued above one
11 million dollars and at or below five million dollars, contracts valued above five million dollars
12 and at or below twenty five million dollars, and contracts valued above twenty five million
13 dollars;

14 § 2. Subparagraph b of paragraph 1 of subdivision 1 of section 6-129 of the administrative
15 code of the city of New York, as amended by local law number 1 for the year 2013, is amended
16 to read as follows:

17 (b) for those contracts for which an agency set participation goals in accordance with
18 subdivision i of this section:

1 [(i) The number and total dollar amount of such contracts disaggregated by industry
2 classification, size of contract and status as MBE, WBE, EBE, or non-certified firm, and further
3 disaggregated by minority and gender group, and the number and dollar value of such contracts
4 that were awarded to firms that are certified both as MBEs and WBEs;]

5 [(ii)] (i) the number and total dollar value of such contracts that were awarded to
6 qualified joint ventures and the total dollar amount attributed to the MBE, WBE or EBE joint
7 venture partners, disaggregated by minority and gender group, size of contract and industry
8 classification, and the number and dollar value of such contracts that were awarded to firms that
9 are certified both as MBEs and WBEs;

10 [(iii)] (ii) The number and total dollar value of subcontracts approved during the
11 reporting period that were entered into pursuant to contracts for which participation requirements
12 under this section have been established (including both contracts awarded during the current
13 reporting period and those awarded in earlier reporting periods that remain open during the
14 current reporting period), and the number and total dollar amount of such subcontracts awarded
15 to MBEs, WBEs and EBEs, disaggregated by minority and gender group, size of subcontract and
16 industry classification, and the number and dollar value of such subcontracts that were awarded
17 to firms that are certified both as MBEs and WBEs;

18 [(iv)] (iii) a list of the requests for full or partial waivers of participation requirements for
19 such contracts made pursuant to paragraph 11 of subdivision i of this section and the
20 determinations made with respect to such requests, and the number and dollar amount of those
21 contracts for which such waivers were granted, disaggregated by industry classification; and

22 [(v)] (iv) a list of the requests for modification of participation requirements for such
23 contracts made pursuant to paragraph 12 of subdivision i of this section and the determinations

- 1 made with respect to such requests, and the number and dollar amount of those contracts for
- 2 which such modifications were granted, disaggregated by industry classification;
- 3 § 3. This local law takes effect immediately.

SMD
LS#6325

By Council Member Rosenthal, Chin, Johnson, Koo, Mendez and Rose

A Local Law to amend the administrative code of the city of New York, in relation to amending reporting requirements and agency goals related to M/WBE participation

Be it enacted by the Council as follows:

1 Section 1. Clause iv of subparagraph b of paragraph 1 of subdivision 1 of section 6-129 of
2 the administrative code of the city of New York, as amended by local law number 1 for the year
3 2013, is amended to read as follows:

4 (iv) [a list of the] the number of requests for full or partial waivers of participation
5 requirements for such contracts made pursuant to paragraph 11 of subdivision i of this section
6 [and the determinations made with respect to such requests, and the number and dollar amount of
7 those contracts for which such waivers were granted, disaggregated by industry classification];
8 and

9 § 2. Subparagraph h of paragraph 1 of subdivision 1 of section 6-129 of the administrative
10 code of the city of New York, as amended by local law number 1 for the year 2013, is amended
11 to read as follows:

12 (h) [a list of all] the number of solicitations submitted to the city chief procurement
13 officer pursuant to subparagraph e of paragraph 2 of subdivision h of this section [and a
14 summary of the determination made regarding each such submission]; and

15 § 3. Paragraphs 1 and 5 of subdivision g of section 6-129 of the administrative code of
16 the city of New York, as amended by local law number 1 for the year 2013, are amended to read
17 as follows:

18 (1) Beginning May 15, 2006, and on [April 1] July 1 of each year thereafter, each agency
19 which, during the fiscal year which ended on June 30 of the preceding year, has made

1 procurements in excess of five million dollars, without counting procurements that are exempt
2 pursuant to paragraph two of subdivision q of this section, shall submit an agency utilization plan
3 for the fiscal year commencing in July of the year when such plan is to be submitted to the
4 commissioner. Upon approval by the commissioner such plan shall be submitted to the speaker
5 of the council. Each such plan shall, at a minimum, include the following:

6 (5) The commissioner, in consultation with the city chief procurement officer, shall, no
7 later than [July 31] April 1 of each year, publish on the division's website a plan and schedule for
8 each agency detailing the anticipated contracting actions for the upcoming fiscal year that form
9 the basis for the agency utilization plan of each such agency. The plan and schedule shall include
10 information specific to each prospective invitation for bids, request for proposal, or other
11 solicitation, including, but not limited to, the specific type and scale of the services and/or goods
12 to be procured, the term of the proposed contract, the method of solicitation the agency intends to
13 utilize, and the anticipated fiscal year quarter of the planned solicitation.

14 § 4. Paragraph 2 of subdivision g of section 6-129 of the administrative code of the city
15 of New York, as amended by local law number 1 for the year 2013, is amended to read as
16 follows:

17 (2) An agency utilization plan shall set forth specific participation goals for MBEs,
18 WBEs and/or EBEs for purchases of professional services, standard services, construction and
19 goods [valued at or below twenty thousand dollars, and for purchases of professional services,
20 standard services, construction and goods valued at or below one hundred thousand dollars].
21 When setting its goals for such purchases, in addition to the factors set forth in paragraph (1) of
22 this subdivision, each agency shall specifically consider the potential for such purchases to

1 provide opportunities for MBEs, WBEs and EBEs to develop greater capacity, thereby
2 increasing competition for city procurements.

3 § 5. Paragraph 3 of subdivision 1 of section 6-129 of the administrative code of the city of
4 New York, as amended by local law number 1 for the year 2013, is amended to read as follows:

5 (3) If an agency that has submitted an agency utilization plan pursuant to subdivision g of
6 this section fails to achieve its utilization goal, the agency head shall prepare and submit to the
7 director, the commissioner, the city chief procurement officer, and the speaker of the council by
8 [October first] January 31 a performance improvement plan which shall describe in detail the
9 efforts such agency intends to undertake to increase M/WBE participation.

10 § 6. This local law takes effect immediately.

SMD
LS# 6326
LS#6330
LS# 6331

Proposed Int. No. 1021-A

By Council Members Rosenthal, Cornegy, Crowley, Chin, Johnson, Koo, Mendez, Rose, and Wills

A Local Law to amend the administrative code of the city of New York, in relation to requiring a minority and women-owned business enterprise consultant for city projects with budgets in excess of ten million dollars

Be it enacted by the Council as follows:

Section 1. Paragraph 2 of subdivision h of section 6-129 of the administrative code of the city of New York is amended to add new subparagraph g to read as follows:

(g) For each agency project with a contract budget in excess of ten million dollars and for which minority and women-owned business participation goals have been established pursuant to this section, the contracting agency shall hire an independent consultant with expertise in minority and women-owned business procurement to perform the following functions: (i) assisting the prime contractor in recruiting minority and women-owned businesses for procurement opportunities on such project; (ii) monitoring the prime contractor's compliance with minority and women-owned business participation goals; and (iii) reporting to the contracting agency on the prime contractor's performance in meeting minority and women-owned business participation goals.

The prime contractor shall pay all costs associated with such independent consultant.

§2. This local law shall take effect 120 days after its enactment into law.

ASB
10/29/15
LS # 6651

Res. No. 923

Resolution adopting the rule amendment of the Procurement Policy Board to raise the micropurchase limit for the procurement and award of construction contracts to \$35,000.

By Council Member Rosenthal, Chin, Johnson and Mendez

Whereas, It has been two years since the micropurchase limit has been increased for the City of New York; and

Whereas, On October 21, 2015, the Procurement Policy Board ("PPB") adopted a rule amendment raising the micropurchase limit for procurements of construction under Section 3-08 of the PPB Rules, for which no competition is required, from twenty thousand dollars (\$20,000) to thirty-five thousand dollars (\$35,000); and

Whereas, Raising the micropurchase limit for procurements of construction will significantly reduce processing time for relatively small procurements and allow agencies to process these procurements in a more efficient and flexible manner; and

Whereas, As indicated by the PPB, raising the micropurchase limit for procurements of construction will also increase the ability of New York City agencies to meet the goals set under the Minority and Women Owned Enterprise ("MWBE") Program for the proportion of City contracts that are awarded to certified MWBE firms; and

Whereas, Section 314 of the New York City Charter requires concurrent action by the Council of the City of New York and the PPB to establish dollar limits for such small purchases; and

Whereas, A copy of the adopted PPB rule amendment is attached hereto and incorporated herein; now, therefore, be it

Resolved, That the Council of the City of New York adopts the rule amendment of the Procurement Policy Board to raise the micropurchase limit for procurements of construction to \$35,000.

Section 1. Subdivisions (c) and (d) of section 3-08 of Chapter 3 of Title 9 of the Rules of the City of New York is amended as follows:

§3-08 Small Purchases

(c) Scope.

(1) Competition Objective.

(i) Public notice of solicitation and award, presolicitation review report, Recommendation for Award, vendor protests, written notice to the low bidder or offeror of non-responsiveness, VENDEX Questionnaire (unless the aggregate value of purchases, franchises, and concessions awarded to that vendor including this one during the immediately preceding twelve-month period equals or exceeds \$100,000), and public hearing shall not be required for small purchases awarded pursuant to this section.

(ii) Micropurchases. For procurements of goods and all services except construction the value of which is \$20,000 or less, and for procurements of construction the value of which is \$35,000 or less, no competition is required except that in making purchases below this limit, Contracting Officers shall ensure that the noncompetitive price is reasonable and that purchases are distributed appropriately among responsible vendors, including M/WBE vendors. Documentation of such purchases shall identify the vendor the item was purchased from, the item purchased, and the amount paid.

(iii) Small Purchases. For procurements of goods and all services except construction [in] valued over \$20,000 or procurements of construction valued over \$35,000 through the small purchase limits, at least five vendors shall be solicited at random from the appropriate citywide small purchases bidders list established by the CCPO for the particular goods, services, construction, or construction-related services being purchased, except where the bidders list consists of fewer than five vendors, in which case all vendors on the list shall be solicited. Agencies may additionally employ any small purchase technique sanctioned by DSBS that is not otherwise in violation of these Rules. The agency may solicit additional vendors but only with the approval of the CCPO. Responsive bids or offers shall be obtained from at least two vendors. For purposes of this section, a response of "no bid" is not a responsive bid. If only one responsive bid or offer is received in response to a solicitation, an award may be made to that vendor if the Contracting Officer determines that the price submitted is fair and reasonable and that other vendors had reasonable opportunity to respond.

(2) Solicitation Methods and Use.

For small purchases of particular goods and all services except construction valued at more than \$20,000 and small purchases of construction valued at more than \$35,000, agencies shall use a written solicitation describing the requirements, which shall contain, at a minimum:

- (i) a description of the item or service requested;
- (ii) time, date, place, and form of requested response;
- (iii) basis for award; and

- (iv) name and telephone number of the Contracting Officer to whom inquiries may be directed.
- (d) Award. Small purchases for goods and all services except construction valued at over \$20,000 or small purchases for construction valued at over \$35,000 shall be awarded to the lowest responsive and responsible bidder or to the responsive and responsible offeror that has made the most advantageous offer. After such determination has been made and all necessary approvals have been obtained, the Contracting Officer shall issue a purchase order or contract, as appropriate, to the successful bidder or offeror.

ASB
LS #5658
8/28/2015