MARGARET MOREE
Director of Federal Affairs

November 15, 2010

Mr. Thomas P. Regan
New York State Department of Economic
Development
30 South Pearl Street
Albany, New York 12245

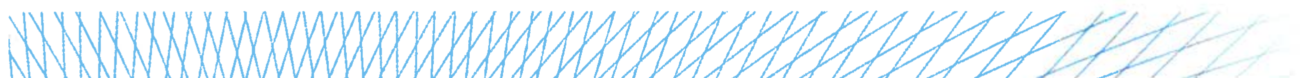
I.D. No. EDV-39-10-00021-P

Dear Mr. Regan:

The Business Council of New York State respectfully submits the following comments on proposed rulemaking to implement the 2010 Business Diversification Act.

Broadly speaking the draft regulations impose substantial new reporting and compliance requirements upon state agencies and contractors, which do little to meet the overall objective of the statute: to increase the number of minority and/or women owned businesses participating and benefiting from state contracts. Rather, the scope of these regulations may have an unintended impact of limiting the participation in state contracting opportunities. The regulations as written will undoubtedly lengthen the procurement process which is already cumbersome, at best. As agencies seek to incorporate within their bids the elements necessary to evaluate diversity practices, determining the best way to evaluate this component of the bid to avoid bid challenges will require careful and well-documented review procedures. Equally important, no provisions are made within these regulations regarding the inclusion of proprietary information within bid documents, the nature of the business cycle and how staffing arrangements may change from time of bid submission to time of bid award, to time of actual contract execution to time of contract performance, and how that information is to be properly evaluated.

While the intent of increasing the number of certified MWBEs and increasing their participation in state contracting is a worthy public policy objective and one which The Business Council supports, an immediate consequence of implementing the regulations and statute will likely be an increase in state contracting dollars going to out-of-state contractors as bidders seek to meet the agency MWBE contracting goals submitted in their plans. We draw this conclusion because the Diversity Study, which serves as a foundation for the new statute and these draft regulations, identified a critical shortage of certified MWBEs in the state, a shortage of certified MWBEs within certain sectors, as well as a shortage of certified MWBEs participating in state contracts. Unless there is a significant increase in the overall number of certified MWBEs in New York State, a very near



term consequence will be non-MWBE New York small businesses losing out to out-of-state certified MWBEs. Finally, it must be acknowledged that there are costs to comply with the various recordkeeping and disclosure requirements on business. These costs will ultimately and legitimately get built into the bid price – likely increasing costs to the state for the goods and services being procured.

§140.1(cc), Definition of Significant Business Presence
This definition is so broadly construed as the likely consequence will be less opportunity for New York-based MWBEs to compete and benefit from state contracting.

§140.1(gg)(4) and (5), Definition of State Contract
Executive Law §310(13) defines state contracts for this purpose. The language included in §140.1(gg)(4) and (5) expands beyond the statutory definition the scope of contracts covered under the law with the inclusion of (gg)(4) and (gg)(5). No basis is provided for this regulatory expansion; regulations clarify the statute, but should not go beyond the reach of the statute.

Additionally §140.11(gg)(5) includes a reference to Article 116 of the State Finance Law which does not exist. If what is intended is a reference to Article 11 of the State Finance Law, this represents a substantive change, as this Article covers all procurement contracts and is much broader than the definition under the Executive Law. Article 11 covers procurements such as preferred source offerings, surplus property, and recycled and remanufactured contract items. Additional time for comment should be provided once clarification is provided by ESD on the intent within this definition.

§140.1(hh), Definition of Subcontract
The definition in the regulations is inconsistent and goes beyond the statutory definition found in Executive Law §310(14). The statute is very specific in defining a subcontract as "an agreement providing for a total expenditure in excess of twenty-five thousand dollars for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon between a contractor and any individual or business enterprise, including a sole proprietorship, partnership, corporation, or not-for-profit corporation, in which a portion of a contractor's obligation under a state contract is undertaken or assumed, but shall not include any construction, demolition, replacement, major repair, renovation, planning or design of real property or improvements thereon for the beneficial use of the contractor." It is unclear how the proposed regulation can redefine the statute in this regard.

§140.1(nn), Verification
The language in the definition "any act necessary" is overly broad, particularly given that no timeframes are imposed upon the division within §144.3 to respond to a completed application.

§142.3, Diversity Practices, Bidding and Award considerations

142.3(a): This should be reorganized to clarify the application of items (a)(1)-(4). They should likely follow the sentence which reads: "The contracting

agency shall determine whether it is practical, feasible and appropriate to include in the valuation of bids and proposals the diversity practices of all contractors making submissions."

142.3(c): Please clarify whether the term "gross revenues" is intended to mean the same thing as "gross receipts or sales" as used on the IRS Form 1120. Also, please clarify how the agency intends to measure MWBE utilization by a contractor within its own practices through the use of "gross revenues".

142.3(c): This section of the regulations requires extensive reporting of fully documented information from contractors and subcontractors, all pursuant to the language in the regulations, "subject to audit to the satisfaction of the director." It is unclear whether businesses will have this information segregated in a manner to report consistently to meet the "audit" and "fully documented" standards articulated in the regulations. The language "to the satisfaction of the director" is arbitrary and overly broad and inconsistent with how evaluation of this component of a bid process would likely flow. Also, the regulation anticipates that a contractor would have maintained records on its own contracting in a manner consistent with the definitions used in these regulations.

This section states that bidders' "diversity practices" will be evaluated based on what percent of their total business activity is related to MWBEs. This would be a difficult if not impossible evaluation for some businesses to engage in, if they have no reason or mechanism to track such data. It seems as well that any business done with a large publicly traded business would be an automatic strike against a bidder, for no rational purpose. Moreover, the purpose of this rule is to increase the involvement of MWBEs in state contracts. It appears the only test is the percent of MWBE involvement that would result from a particular contractor's bid. Data on that bidder's overall business activity, which could include many contracts with no artificial MWBE requirements, is irrelevant for achieving the State's objectives.

142.3(c)(4): It seems unlikely that gross revenues would be paid to a joint venture partner or teaming agreement partner, as payments would be made directly to the joint venture or team. Please clarify what is intended.

142.3(c)(5): Please clarify what is intended by this section as it relates to overhead expenses internal to the contractor.

142.3(c): The regulation notes that the director "shall provide each state agency with a matrix for assessing a contractor's diversity practices. The assessment is to be used as one of the factors in determining the award of such a contract." As this then becomes a scoreable item for awarding contracts, the numerical guidelines should be published for public comment and for understanding the validity behind the numerical guidelines being proposed. This is important to ensure consistency of application across state agencies, as well as consistency within the bidding process. It is particularly important for potential state contractors, including certified MWBEs, to have

access to this matrix well in advance of bids being solicited so they can determine how best to align their business reporting to ensure they can be deemed a responsible bidder.

§143.2 General Work Force Diversity Requirements for State Agencies Awarding Contracts

143.2(d)(1): The regulation that defines affirmative action with the sentence beginning, "For these purposes, affirmative action **shall** apply …." (emphasis added) goes far beyond the definitions consistent with federal law and well beyond the role or expertise of state agencies to equitably, consistently and appropriately enforce. This language pursuant to the regulation is to appear in bids, proposals and state contracts. This is one area where an unintended consequence may be businesses of all sizes, including MWBEs, choosing to forego the opportunity to participate in state bidding as the compliance and enforcement provisions are onerous and could be remuneratively punitive.

143.2(d)(2): This section starts with "Prior to the award of a State Contract…." It is unclear what is intended and to whom this is directed. Given the lead-in language of 143.2(d), what distinction is being made in this section?

143.2(d)(3)(i): This section sets forth mandatory elements of a contractor's EEO policy statement and stipulates that contractors "shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its workforce on state contracts." The terms "conscientious" and "active" are not defined and thus left to the interpretation of the agency audit process. This leaves contractors vulnerable to subjective evaluations of whether they have complied with the spirit of the regulation.

143.2(d)(4): This section requires contractors to submit a staffing plan of the anticipated workforce to be utilized on the state contract. It notes that the "form of the staffing plan shall be supplied by the contracting agency." This is unduly burdensome on several different levels: it will not promote consistency across state agencies in terms of data collected; and it will require contractors which may do business with numerous different state agencies to collect and report information in multiple formats. There should be one form for non-construction contracts, and one for construction contracts, to be developed and disseminated for public comment as part of the rulemaking process, prior to adoption and enforcement.

143.2(d)(5): This section begins with "After an award of a state contract…." The remainder of the language then speaks to reporting required of the contractor in language that would appear to read at the completion of the contract terms. The language at the outset should be clarified to read "After the completion of the contract terms." If that is not the intent, then the timeframe for reporting of this information ought to be clarified so the terms are consistently used and applied. There is usually a time lag, sometimes

significant, between the awarding of a contract and the approval and execution of that contract by the State Comptroller.

§143.3 Work Force Diversity Bidding and Award Requirements

143.3(i): Please clarify that the intent is that OGS will conduct all data collection and review for contractors which are on the state's "centralized contract" list. As purchasing is not centralized, we seek to ensure that contractors are not held out of compliance with these regulations should OGS not be aware of when an agency uses the centralized list for its purchases.

§143.4 Contractor Work Force Diversity Compliance

143.4(b) and (c): The terms "in-depth compliance reviews" and "selected" are not defined within the context of this regulation. Additionally, in (c) it notes that one factor to trigger an in-depth review should be the results of an agency's "comparison of the ratios of women and minority group members in a contractor's work force to the relevant availability and expected levels of participation of minority group members and women on state contracts." Please explain how expected levels of participation is to be determined to understand whether the methodology which would trigger an "in-depth review" is valid.

143.4(d) and (e): The time period for notification of review to a contractor of ten days is far too short. Many businesses do not keep the scope of documents identified on site and given the penalties noted in (e), a minimum of thirty days notice should be provided.

143.4(f)(2): A contractor's efforts shall be evaluated on a number of factors including "whether the contractor sent letters..." If the regulation intends to be that proscriptive, then it ought to reflect modern tools for work force recruitment including electronic job board postings, email, social media, etc.

143.4(f)(5): This particular factor - whether "internal procedures exist..." does not seem an appropriate role for state agency contract performance compliance.

§144.2 Eligibility Criteria

144.29(c)(5): The list of out-of-state and federal certifications which the division recognizes should be publicly available on the division's website and listed within the regulation, as are other such references.

§144.3 Application Intake and Verification.

While there are numerous timeframes within which the applicant must submit information to the division, the regulations set forth no timeframe within which the division must schedule the site visit. For instance, in 144.3(g) it notes that "an application shall be deemed complete when a site visit by the

division to the applicant's place of business has occurred..." The preceding sections (a) through (f) provide timeframes within which the division must notify an applicant of deficiencies and timeframes for an applicant to cure the deficiencies. As one of the major findings of the Diversity Study was the lack of certified MWBEs, including enforceable timeframes within the regulation upon the division is one way to ensure that applications are being routinely reviewed, site visits scheduled, and applications are moving through the pipeline. Much as the Comptroller allows for review of a contract through the processing phase, the division ought to consider a similar site to allow for all contractors to review the "pending application" status. This would also serve as one way to promote new MWBEs under consideration to potential prime contractors.

§144.4 Notice of determination, right to appeal, and requests for hearing

144.4(a): Although no timeframe is given in Section 144.3 to actually schedule the site visit, almost three months may pass before the division provides written notice of determination ("60 days" is, per the definitions in the regulations, 60 business days.) This does not include the time lost up to the point of a completed site visit. Given the objective of increasing the number of certified MWBEs participating in state contracts, it would appear the division has a responsibility to make the timeframes for determination much tighter than permitted in these regulations.

144.4(c): Given the provisions in Section 144.4(e) for requesting a hearing on a denial, it would be appropriate for the written notice of denial referenced in this section to include more than the "reasons." If documents were not provided, they should be specifically detailed; if documents were found deficient, those should be specifically and sufficiently noted; and if the site visit found deficiencies, a copy of the site visit review should be included. The overall goal here is to ensure compliance with the law and to increase the number of certified MWBEs in New York State. We should not turn the process into an overly cumbersome process reliant on an unsuspecting applicant to be smart enough to "ask for the right document." This is one area where the division ought to significantly increase compliance assistance upfront, rather than after the fact, and the regulations ought to reflect that.

144.4(e): This is awkwardly worded, or requires correction. Referring to comments in 144.4(c), this is one area where the division ought to better understand its overall mission. A hearing request must be based on documents provided with the application – which of course the agency already has. Also, if the hearing must be based on information gleaned pursuant to the site visit, this presumes that a copy of a site visit review was provided to the applicant at the time it was completed. Close this information loop so the applicant actually has all relevant documents needed, rather than having to FOIL them as part of a hearing process.

§144.5 Appeals

144.5(b): The language "the applicant may reapply sooner" found at the end of this section is vague and arbitrary. What basis does the division have to deny an applicant to apply for certification at any time once facts and circumstances forming the basis of the denial have changed significantly?

§144.6 Revocation of minority-or woman-owned business enterprise status

144.6(d): Similar to the comment on 144.5(b), the term "sooner" is vague and arbitrary. If facts and circumstances forming the basis of the revocation have changed significantly, what basis does the division have to deny an applicant from applying at that point in time?

On behalf of The Business Council, I appreciate the opportunity to submit formal comments on the rulemaking. We believe these regulations propose such a significant departure from current practice that public hearings should have been conducted to better understand how to implement the statute in a manner to foster greater participation by New York certified MWBEs. As many of our members, large and small, certified and non-certified, do business with New York State, it is also important that rulemaking be sensitive to current business practice and how activities are reported and recorded within their businesses, before such broad disclosure requirements are imposed. The Procurement Council would be an ideal vehicle through which issues like this could and should be vetted. Business Council staff regularly attend these meetings, and the breadth of these regulations were not discussed or vetted at the meetings held subsequent to the legislation being signed into law. With such a substantive change in public policy, we think all parties to the contracting system could benefit from a process which respects the law's intent and aligns the regulations in such a manner as to not put undue burdens on bidders or state agency personnel.

We would welcome further dialog with stakeholders before these rules are finalized.

Sincerely,