VETO MESSAGE - No. 59

TO THE ASSEMBLY:

I am returning herewith, without my approval, the following bill:

Assembly Bill Number 250, entitled:

"AN ACT to amend the executive law and the education law, in relation to "New York First" commitments"

NOT APPROVED

This bill would require all entities applying for funding through the New York State Office of Science, Technology and Academic Research (NYSTAR) under Article 10-B of the Executive Law to commit to first "considering" New York State-based companies to provide the services or products necessary to implement the proposal being funded. The legislation also requires all research, development and commercial enterprises occupying university-related economic development facilities developed, constructed or operated under the State University Construction Fund (the Fund) to commit to the State University of New York's (SUNY) Trustees that New York State-based companies will receive first consideration to provide products or services.

The intent of the bill is laudable: to ensure that research and development awards funded by taxpayer dollars are utilized to create jobs in New York State. However, the meaning of many of the bill's provisions is unclear. Ambiguous requirements under the bill include the following: grant recipients must give "evidence" of a "commitment" to "first consider" companies "based in" New York State. Without defining these terms, it is not clear what constitutes evidence of a commitment, what "considering" New York companies entails, and what it means to be a company "based" in New York.

Conditioning grants of public dollars to entities that commit to considering companies based in New York State as primary suppliers could also offend the dormant Commerce Clause. The Supreme Court has made clear that under the dormant Commerce Clause doctrine, "states may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." Granholm v. Heald 544 U.S. 460, 472 (2005). In determining whether a violation occurs, courts look to whether the statute serves a legitimate local purpose and, if it does, whether alternative means exist to promote the local purpose without discriminating against interstate commerce. However, facial discrimination by itself could prove to be a fatal defect, and will invoke the strictest scrutiny of the purported local purpose. See Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

Under this bill, companies applying for university-related State economic development grants would have to commit to considering companies based in New York State first as primary suppliers, and state that economic growth resulting from the award will, to the extent feasible, take place in New York State. This would invite litigation from out-of-

state entities interested in applying for such grants.

Finally, the bill's language amending the Fund statute would apply to all projects undertaken by the Fund, whether funded with private money or State money. Attaching requirements when no State funding is involved could deter business participation and work against the bill's goal of furthering economic development for the state. For these reasons, the bill is opposed by the SUNY, the City University of New York and the Business Council of New York State.

The bill is disapproved. (signed) DAVID A. PATERSON

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