

CHAPTER 10**GOODS AND SERVICES CONTRACTS FOR SMALL BUSINESSES, MINORITY BUSINESSES AND FEMALE BUSINESSES****Authority**

N.J.S.A. 10:5-36(k) and (o), 52:18A-30(d), 52:25-1 et seq., 52:27H-6(f), 52:32-17 et seq., 52:34-6 et seq., 52:34-12, 52:34-13 and Executive Order No. 84(1993).

Source and Effective Date

R.1998 d.199, effective March 26, 1998.
See: 30 N.J.R. 602(a), 30 N.J.R. 1424(b).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 10, Goods and Services Contracts for Small Businesses, Minority Businesses and Female Businesses, expires on September 22, 2003. See: 35 N.J.R. 1836(a).

Chapter Historical Note

Chapter 10, Small Business Set-Aside, was adopted jointly with the Department of the Treasury as R.1984 d.421, effective October 1, 1984. See: 16 N.J.R. 1958(a), 16 N.J.R. 2683(a).

Chapter 10, Small Business Set-Aside, was repealed and Chapter 10, "Contracts for Small Businesses, Female Businesses and Minority Businesses", was adopted jointly with the Department of the Treasury as R.1987 d.143, effective March 16, 1987. See: 18 N.J.R. 2306(a), 19 N.J.R. 457(b).

Chapter 10, Contracts for Small Businesses, Female Businesses and Minority Businesses, was readopted and Subchapter 2, "Minority and Female Subcontractor Participation in State Construction Contracts" was adopted as Emergency R.1989 d.481, effective August 14, 1989 (expired October 13, 1989). A concurrent readoption and adopted concurrent new rules were filed on October 13, 1989 as R.1989 d.554. See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Subchapter 1, formerly "Goods and Services Contracts for Small Businesses, Urban Development Enterprises and Micro Businesses", was redesignated as "Purpose, Scope and Definitions", Subchapter 2, formerly "Minority and Female Subcontractor Participation in State Construction Contracts", was redesignated as "Set-Aside Eligibility Requirements for Small Businesses, Minority Businesses and Female Businesses" and Subchapters 3, 4 and 5 were adopted by R.1994 d.309, effective January 3, 1995. See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

The expiration date of Chapter 10, Goods and Services Contracts for Small Businesses, Minority Businesses and Female Businesses, was extended by gubernatorial directive from October 13, 1994 to March 31, 1995. See: 26 N.J.R. 4411(a).

Pursuant to Executive Order No. 66 (1978), Chapter 10, Goods and Services Contracts for Small Businesses, Minority Businesses and Female Businesses, was readopted as R.1995 d.224, effective March 30, 1995. See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

Pursuant to Executive Order No. 66 (1978), Chapter 10, Goods and Services Contracts for Small Businesses, Minority Businesses and Female Businesses, was readopted as R.1998 d.199, effective March 26, 1998. See: Source and Effective Date.

Law Review and Journal Commentaries

Battle for state contracts: What process is due in a challenge to a state contract award? Patrick D. Kennedy & Maeve E. Cannon, 180 N.J.Law. 16 (Mag.) (Oct./Nov. 1996).

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SUBCHAPTER 1. PURPOSE, SCOPE AND DEFINITIONS**12A:10-1.1 Purpose and scope**

(a) The rules in this chapter are jointly promulgated by the Department of Commerce and Economic Development (hereinafter, "Department of Commerce") and the Department of the Treasury to implement N.J.S.A. 52:32-17 et seq., and Executive Order No. 84, dated March 5, 1993, to establish a set-aside program that requires State agencies with contracting authority to make a good faith effort to award 15 percent of State contracts to eligible small businesses, seven percent of State contracts to eligible minority businesses and three percent of State contracts to eligible

female businesses. These percentage goals are overall program goals for each State contracting agency. State contracting agencies are expected to apply their business judgment when establishing set-aside subcontracting goals for individual contracts.

(b) These rules apply only to State contracts for goods and services awarded by any State contracting agency and are not applicable to the award of State contracts for construction and construction related services.

(c) Applications and questions regarding eligibility as a small business, minority business and/or female business should be addressed to:

Department of Commerce and Economic Development
Set-Aside and Certification Office
20 West State Street
PO Box 835
Trenton, New Jersey 08625-0835

Questions concerning the award of contracts under these rules should be directed to the State contracting agency issuing the particular contract.

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

(a): contract award goals of 15 percent, seven percent, and three percent set for small business, urban development enterprise, and micro business, respectively. (b): "urban development enterprise and micro business" replaced "minority and female businesses". (c): cross-references changed. (d): addresses revised. (e): "except where expressly inconsistent with statutory law" added; department names updated. Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted with changes.

Amended by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

12A:10-1.2 Definitions

(a) The words and terms used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Bidding threshold" means the dollar limit placed on all public contracting agencies pursuant to N.J.S.A. 52:34-7 to establish when public advertisement of bids is required.

"Certification" means the process whereby a minority-owned business or female-owned business is authenticated for participation in State programs requiring such certification, as judged and determined by the Set-Aside and Certification Office of the Department of Commerce and Economic Development.

"Commissioner" means the Commissioner of the Department of Commerce and Economic Development or his or her designee.

"Contractor" means any party providing goods and/or services or performing or offering to perform under a contract issued by a State contracting agency.

"Cooperative purchasing" means an extension of certain State contracts awarded by the Division of Purchase and Property for the use of either local governing authorities, pursuant to N.J.S.A. 52:25-16.1 et seq., volunteer fire departments, volunteer first aid squads and rescue squads, pursuant to N.J.S.A. 52:25-16.2, county colleges, pursuant to N.J.S.A. 18A:64A-25.9(b), State colleges, pursuant to N.J.S.A. 18A:64-60, or quasi-State agencies, pursuant to N.J.S.A. 52:27B-56.1. Such an award is made as an adjunct to an award of a contract for State agency purchases.

"Delegated Purchasing Authority" means the authority of a State agency to award contracts below the bid threshold amount pursuant to authority delegated by the Director, Division of Purchase and Property. (See N.J.S.A. 52:25-23.)

"Division of Purchase and Property" means the State agency within the Department of the Treasury which provides centralized purchasing of goods and services for other State departments, pursuant to N.J.S.A. 52:27B-56.

"Female business" means a business which has its principal place of business located in the State, is independently owned and operated and at least 51 percent is owned and controlled by women.

"Line item contract" means an award in which a specific one-time purchase of goods or services is established.

"Minority business" means a business which has its principal place of business located in the State, is independently owned and operated and at least 51 percent of which is owned and controlled by persons who are African Americans, Latinos or Asian Americans, defined as follows:

1. African American: a person having origins in any of the black racial groups of Africa.
2. Latino: a person of Mexican, Puerto Rican, Cuban, Central or South American, Caribbean Island or other Spanish culture or origin, regardless of race.
3. Asian American: a person having origins in any of the original peoples of the Far East, Southeast Asia, and Indian subcontinent, Hawaii or the Pacific Islands.

"Multi-source contract" means a term contract awarded by the Division of Purchase and Property wherein more than one vendor is awarded a contract. The term is applicable in two situations, when defined in conjunction with the Division of Purchase and Property (see N.J.S.A. 52:34-12.1):

1. Where the volume of business is so large or the geographical distances are so great that more than one vendor is necessary to serve the State's needs; or

2. Where the differences between manufacturers' versions of a product are so significant that it is necessary to have a contract with a vendor of each product.

"Registration" means the process by which any business can have its eligibility for participation in small, minority and female set-aside contracts determined.

"Request for Proposals" or "RFP" means the document issued by a State contracting agency to initiate an advertis-

ing bidding and contract award process. The RFP establishes the contract's basic terms and conditions, the product and/or service specifications, and the bidding requirements which may include a set-aside provision that restricts bidding eligibility to businesses qualified as small business, minority business or female business.

"Set-aside contract" means a contract, or a portion of a contract when that portion is so allocated, specifically designated by a contracting agency as exclusively being available for award to either a small business, minority business or female business.

"Small business" means a business which has its principal place of business in the State, is independently owned and operated, and has no more than 100 full-time employees.

"State contracting agency" means any board, commission, committee, authority or agency of the State which possesses the legal authority to award contracts for goods and services which include the following entities except where expressly inconsistent with statutory law:

1. DEPARTMENTS:
 - Agriculture
 - Banking
 - Personnel
 - Commerce, Energy and Economic Development
 - Community Affairs
 - Corrections
 - Education
 - Environmental Protection
 - Health
 - Higher Education
 - Human Services
 - Insurance
 - Labor
 - Law and Public Safety
 - Military and Veterans Affairs
 - Public Advocate
 - State
 - Transportation
 - Treasury
2. COLLEGES:
 - Glassboro State College
 - Jersey City State College
 - Kean College of New Jersey
 - Montclair State College
 - New Jersey Institute of Technology
 - Ramapo College of New Jersey
 - Richard Stockton State College
 - Rutgers the State University
 - Thomas E. Edison College
 - Trenton State College
 - University of Medicine and Dentistry of New Jersey
 - William Paterson College of New Jersey
3. AUTHORITIES:
 - Board of Public Utilities
 - Casino Redevelopment Authority
 - Development Authority for Small Businesses, Minorities and Women's Enterprises
 - Expressway Authority
 - Health Care Facilities Financing Authority
 - Highway Authority
 - N.J. Economic Development Authority
 - N.J. Educational Facilities Authority
 - N.J. Health Care Facilities Financing Authority
 - N.J. Housing & Mortgage Finance Agency
 - N.J. Transit Corp.
 - N.J. Water Supply Authority
 - Public Broadcasting Authority
 - Sports and Exposition Authority

- Turnpike Authority
- Urban Development Corporation
- 4. COMMISSIONS:
 - Beach Erosion Commission
 - Casino Control Commission
 - County and Municipal Government Study Commission
 - Election Law Enforcement Commission
 - Executive Commission on Ethical Standards
 - Hackensack Meadowlands Development Commission
 - N.J. Commission on Capital Budgeting & Planning
 - N.J. Racing Commission
 - North Jersey Water Supply Commission
 - Passaic Valley Sewer Commission
 - Pinelands Commission
 - State Commission of Investigation

5. All other departments, colleges, authorities and commissions that are established or may be established in the future.

"Subcontractor" means a third party that is engaged by a contractor to provide all or part of the goods and/or services included in a contract with the State.

"Term contract" means an award made by a State contracting agency in which a source of supply for a product or service is established for a specific period of time. A term contract is generally applied when a State contracting agency:

1. Establishes a fixed unit price or discount for items to be purchased thereunder;
2. Provides for some estimated dollar volume or minimum quantities to be purchased; or
3. Provides for the rebidding of any single purchase which exceeds a specified maximum amount.

"Treasurer" means the Treasurer of the State of New Jersey or his or her designee.

"Waiver of advertising" means an award process authorized by N.J.S.A. 52:34-9 and 52:34-10, which does not require public advertisement and which is subject to approval by the State Treasurer. Whenever possible, competition is sought prior to issuance of a waiver of advertising.

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

In "Cooperative purchasing", volunteer entities and colleges added. In "Delegated Purchased Authority", 2. deleted concerning Director, Division of Building and Construction. "Division of Building and Construction" deleted. "Multi source contract" was "Multiple award contract". In "Request for Proposals", "urban development enterprise or micro business" replaced "minority or female businesses". In "Set-aside contract", the term "subcontract" deleted and business designations revised. "Vendors with the Division of Building and Construction" deleted. In "Waiver", statutory authorization revised. Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Amended by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

12A:10-1.3 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

(a) and (b) revised; new (c) added; existing (c) redesignated (d); old (d) and (e) deleted; new (e) through (i) added.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Standards of eligibility for small businesses, urban development enterprises and micro businesses". See 12A:10-2.1, Standards of eligibility for small businesses, minority businesses and female businesses.

12A:10-1.4 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

In (a), business designations revised; in (b), "character of its ownership" and "employee or affirmative action reports" deleted from documentation requirements; in (b)2, cross-reference revised.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Registration procedures for small businesses, urban development enterprises and micro businesses". See 12A:10-3.1, Certification and registration procedures for small businesses, minority businesses and female businesses.

12A:10-1.5 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

New (a) added; existing (a) redesignated (b); old (b) deleted.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Acceptance as a small business, urban development enterprise or micro business". See 12A:10-3.1, Certification and registration procedures for small businesses, minority businesses and female businesses.

12A:10-1.6 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

Business designations revised.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Time for application to register as a small business, urban development enterprise or micro business". See 12A:10-3.2, Time for application to register as a small business, minority business or female business.

12A:10-1.7 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

In heading and (a), business designations revised; in (b)4, reference to Division of Building and Construction deleted.

Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted with changes.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Procedures for challenging a business registered as a small business, urban development enterprise or micro business". See 12A:10-3.3, Procedures for challenging a business registered as a small business, minority business or female business.

12A:10-1.8 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

Business designations revised.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Obligation to provide information and penalties for failure to provide complete and accurate information".

12A:10-1.9 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

Business designations revised. In (c), "multiple award" language deleted; in (g), business "owned by a black woman" deleted and language concerning Urban Development Corporation Act qualification and 20 full-time employee limitation added.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Purchase goals".

12A:10-1.10 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

In (a), "August 1" was "June 1" and "current" fiscal year was "next"; in (c), "current year's" was "next" and "October 1" was "July 1".

Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted with changes.

Repealed by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Formerly "Set-aside plans".

12A:10-1.11 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).

See: 21 N.J.R. 2810(a).

Business designations revised.

Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.

See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency amendment R.1989 d.481 readopted without change.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Factors in establishing purchasing plans".

12A:10-1.12 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).
See: 21 N.J.R. 2810(a).
Business designations revised.
Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency amendment R.1989 d.481 readopted without change.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Bidders lists".

12A:10-1.13 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).
See: 21 N.J.R. 2810(a).
Business designations revised.
Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency amendment R.1989 d.481 readopted without change.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Set-aside contracts".

12A:10-1.14 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).
See: 21 N.J.R. 2810(a).
Business designations revised.
Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency amendment, R.1989 d.481 readopted with changes.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Purchasing and contracting reports".

12A:10-1.15 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).
See: 21 N.J.R. 2810(a).
In (c), "Division of Development for Small Business and Women and Minority Businesses" added and former business assistance offices deleted.
Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency amendment, R.1989 d.481 readopted without change.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Consultation with industry".

12A:10-1.16 (Reserved)

Emergency amendment, R.1989 d.481, effective August 14, 1989 (expired October 13, 1989).
See: 21 N.J.R. 2810(a).
Language updated to reflect current rules.
Adopted concurrent proposal, R.1989 d.554, effective October 13, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Provisions of emergency amendment R.1989 d.481 readopted without change.
Repealed by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).
Formerly "Delegation of Treasurer's authority".

SUBCHAPTER 2. SET-ASIDE ELIGIBILITY REQUIREMENTS FOR SMALL BUSINESSES, MINORITY BUSINESSES AND FEMALE BUSINESSES

12A:10-2.1 Standards of eligibility for small businesses, minority businesses and female businesses

(a) A business may be eligible as a small business, a minority business, a female business or a portion or combination of the three.

(b) In order to be eligible as a small business, a business must satisfy all of the following criteria:

1. The business must be independently owned and operated, as evidenced by its management being responsible for both its daily and long term operation, and its management owning at least 51 percent interest in the business.

2. The business must be incorporated or registered to do business in the State and have its principal place of business in New Jersey, defined as such when either 51 percent or more of its employees work in New Jersey, as evidenced by the payment of New Jersey unemployment taxes, or 51 percent or more of its business activities take place in New Jersey, as evidenced by its payment of income or business taxes.

3. The business must be a sole proprietorship, partnership or corporation with 100 or fewer employees in full-time positions, not including:

- i. Seasonal and part-time employees employed for less than 90 days, if seasonal and casual part-time employment are common to that industry; and
- ii. Consultants employed under other contracts not related to the goods and services which are the subject of the specific contract the business wants to be eligible as a small business.

(c) In order to be eligible as a minority or female business, a business must satisfy all of the following criteria:

1. The principal place of business must be in the State; and
2. At least 51 percent of the ownership of the business must be by minority or female persons; and
3. Control over the daily and long-term operations of the business must be exercised by one or more of the minority or female owners.

(d) Eligibility is formalized by the Department of Commerce's certification and/or registration and approval processes.

Recodified from 12A:10-1.3 and amended by R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

12A:10-2.2 Obligation to provide information and penalties for failure to provide complete and accurate information

(a) Applicants under these rules shall accurately and honestly supply all information required by the Department of Commerce.

(b) When a business has been approved as an eligible small business, minority business or female business on the basis of false information knowingly supplied by the business and the business has been awarded a State contract or a subcontract thereto, the Commissioner of the Department of Commerce, after notice and opportunity for a contested case hearing pursuant to N.J.S.A. 52:14B-10 and N.J.A.C. 17:1, shall:

1. Assess the business any difference between the contract amount and what the State's cost would have been if the contract had not been awarded in accordance with the provisions of N.J.S.A. 52:32-17 et seq.;
2. In addition, assess the business a penalty in the amount of not more than 10 percent of the amount of the contract or subcontract involved; and
3. Order the business ineligible to transact any business with a State contracting agency for a period of not less than three months and not more than 24 months.

(c) Any business approved by the Department of Commerce as a small business, minority business and/or female business shall immediately apprise the Department of any circumstances which might affect the eligibility of the business under these rules.

(d) The failure of a business to report any such changed circumstances, or the intentional reporting of false information, shall disqualify the business for inclusion on any vendors list under these rules and may subject the business to adverse action by contracting agencies and/or the Attorney General.

New Rule, R.1994 d.309, effective January 3, 1995.
See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

12A:10-2.3 Right to hearing upon denial of contract

A bidder or contractor that is denied any contract or the right to bid on any contract because of a determination that it failed to make a good faith effort to solicit and award subcontracts to eligible minority and female businesses shall be entitled to an administrative hearing as provided by N.J.A.C. 17:12-3.1 through 3.6.

New Rule, R.1995 d.224, effective May 1, 1995.
See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

12A:10-2.4 through 12A:10-2.7 (Reserved)

Recodified to 12A:10A by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

12A:10-2.8 (Reserved)

Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency new rule R.1989 d.481 readopted with changes.
Repealed by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Formerly "Obligation to provide information and penalties for failure to provide complete and accurate information".

12A:10-2.9 (Reserved)

Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency new rule R.1989 d.481 readopted with changes.
Repealed by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Formerly "Subcontracting targets".

12A:10-2.10 (Reserved)

Adopted concurrent proposal, R.1989 d.554, effective November 6, 1989.
See: 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).
Provisions of emergency new rule R.1989 d.481 readopted with changes.
Repealed by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Formerly "Submission of subcontracting information".

12A:10-2.11 (Reserved)

Repealed by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Formerly "Severability".

12A:10-2.12 (Reserved)

Repealed by R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Formerly "Review".

SUBCHAPTER 3. CERTIFICATION AND REGISTRATION

12A:10-3.1 Certification and registration procedures for small businesses, minority businesses and female businesses

(a) Certification procedures established by the Department of Commerce are as set forth in N.J.A.C. 12A:11. Businesses awarded contracts or subcontracts based on their eligibility as registered minority or female businesses must file an application for certification with the Department of Commerce no later than 60 calendar days after the award of the contract. In accordance with N.J.S.A. 52:27H-21.18, small businesses are not required to be certified.

(b) Registration procedures established by the Department of Commerce are as follows:

1. Any business which seeks to register as a small business, minority business and/or female business must apply to the Department of Commerce and pay any applicable fees. For these purposes, the Department of Commerce shall prepare a Vendor Registration Form. This form shall be available from the Department of Commerce and the State contracting agencies.

2. As part of its application to the Department of Commerce, a business shall reasonably document its principal place of business and independent status, and, as appropriate, the number of its employees. Where available, this documentation should include appropriate forms or reports otherwise submitted to or issued by State and Federal agencies, such as employee or affirmative action reports filed with the New Jersey Department of Labor or certificates of incorporation issued by the New Jersey Department of State.

i. If an applicant fails to complete fully the Vendor Registration Form, registration may be delayed or denied.

ii. If an applicant knowingly supplies incomplete or inaccurate information, the applicant shall be disqualified under these rules and may be subject to other penalties described in N.J.A.C. 17:13-2.2 (12A:10-2.2).

3. When an application for registration as a small, minority or female business is approved by the Department of Commerce, the Department will issue the newly registered business an approval notice and add it to the Department's small, minority or female vendor lists.

4. State contracting agencies will utilize these lists in confirming eligibility for set-aside contracts and subcontracts and in reporting progress toward established goals.

Recodified from 12A:10-1.4 and 1.5 and amended by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

Amended by R.1995 d.224, effective May 1, 1995.

See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

Amended by R.1997 d.24, effective January 6, 1997.

See: 28 N.J.R. 1184(a), 29 N.J.R. 146(a).

12A:10-3.2 Time for application to register as a small business, minority business or female business

(a) A business may apply to the Department of Commerce at any time to be registered as a small business, minority business or female business and to be placed on the appropriate vendor list.

(b) If a business is to be considered as a small, minority or female contractor or subcontractor on a specific contract for the purposes of these rules, it must apply to the Department of Commerce for purposes of registration no later than one day prior to the deadline for bids being received and opened by the State contracting agency.

Recodified from 12A:10-1.6 and amended by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

12A:10-3.3 Procedures for challenging a business registered as a small business, minority business or female business

(a) The qualification under these rules of a business on a vendors list as a small business, minority business or female business may be challenged by any other business on that State vendors list or by any of the State contracting agencies subject to these rules.

1. A registration challenge shall be made in writing to the Set-Aside and Certification Office of the Department of Commerce, setting forth the factual basis for the challenge. The Department shall provide a copy of the challenge and a notice granting the opportunity for a hearing to the challenged business. Where a particular contract is at issue, the Department shall also provide a copy of the challenge to the contracting agency.

2. A registration challenge to the Department of Commerce may concern only the qualification of a business under these rules as a small business, minority business or female business. Any challenge to a business's qualifications to perform a contract shall be referred to the appropriate State contracting agency.

(b) When the Department of Commerce receives a challenge, upon request of the business whose registration is at issue, the Department shall conduct a hearing on the matter as follows:

1. The Department shall notify all interested parties of the time and place of the hearing, and of the right to attend and be represented at the hearing.

2. The burden of proof lies with the challenger. However, the Department may use its own resources to ascertain the validity of a challenge and the status of a business.

3. The hearing will be conducted by the designee of the Commissioner of the Department of Commerce. This designee will issue a written report to the Commissioner within four working days following the close of the hearing.

4. At the discretion of the Commissioner's designee, participants at the hearing may be permitted to file written exceptions to the hearing officer's report no later than two working days from the issuance of the report.

5. Thereafter, the Commissioner shall issue a final decision on the challenge and notify the parties by certified letter.

6. A challenge to a business's eligibility shall not stay the contract award process.

Recodified from 12A:10-1.7 and amended by R.1994 d.309, effective January 3, 1995.

See: 25 N.J.R. 4889(a), 27 N.J.R. 129(a).

SUBCHAPTER 4. SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAM

12A:10-4.1 Set-aside program goals and procedures

(a) Each State contracting agency, consistent with its contracting authority, shall establish and administer a set-aside program which provides for at least 15 percent of the dollar value of its contracts and of all subcontracts thereunder to be awarded to eligible small businesses, at least seven percent of the dollar value of its contracts and of all subcontracts thereunder to be awarded to eligible minority businesses and at least three percent of the dollar value of its contracts and of all subcontracts thereunder to be awarded to eligible female businesses, which shall be measured by the total dollar value of all such set-aside contracts in comparison to the total dollar value of all publicly advertised contracts awarded by the agency within a fiscal year.

1. The State contracting agencies shall designate specific contracts for each of the three distinct and exclusive set-aside categories.

2. The State contracting agencies shall, when they deem it appropriate, designate subcontracting goals for specific contracts which have not been set aside in their entirety.

(b) Each State contracting agency shall establish written procedures and maintain records as necessary to define, document and report its good faith efforts to attain the established set-aside contracting goals, including contracts executed under its bidding threshold, as established by N.J.S.A. 52:34-7 et seq. The set-aside procedures shall include the following provisions:

1. The State contracting agency shall review its schedule of contracting opportunities and establish a method of determining which upcoming contracts will be offered as part of the agency's set-aside program.

i. A contract may be considered suitable for set-aside whenever the contracting agency can establish a reasonable expectation that bids may be obtained from at least three qualified eligible businesses capable of furnishing the specified products or services.

ii. The designation as a set-aside contract shall be made prior to public advertisement for bids.

(c) When a State contracting agency has made a determination that a contract in its entirety is suitable for set-aside purposes, the following provisions apply:

1. Public advertisement of the set-aside contracting opportunity shall be consistent with the contracting agency's standard bidding procedures and may be supplemented by special notification efforts to maximize participation.

2. Invitations for bids shall be confined to either small businesses, minority businesses or female businesses, and bids from other bidders shall be rejected.

3. The State contracting agency shall reject all bids and withdraw the designation as a set-aside contract when the agency determines that acceptance of the lowest responsive bid would result in the payment of an unreasonable price or in a contract that is otherwise unacceptable pursuant to that agency's contracting statutes and rules.

i. The State contracting agency shall notify all participating bidders of the bid cancellation, stating the reasons for the cancellation and the agency's intent to re-solicit bids on an unrestricted basis.

ii. Except in cases of emergency, the State contracting agency shall provide an opportunity for a hearing before contract award to address the reasons for the withdrawal of the set-aside designation. This hearing shall not be considered a contested case under the Administrative Procedures Act.

4. The award of any contract designated as a set-aside contract shall be made in accordance with the agency's contracting statutes, rules and procedures.

(d) When the State contracting agency has made a determination that a contract is suitable for subcontract set-aside designation, the following provisions apply:

1. The public advertisement shall include the address and telephone number of the New Jersey Department of Commerce's Set-Aside and Certification Office and a notice to prospective bidders that set-aside goals, or reasonable efforts as required in N.J.A.C. 17:13-4.2 (12A:10-4.2), must be met by any contractor receiving an award.

2. The RFP shall contain a standard form by which the bidder shall certify that it will comply with New Jersey laws pertaining to set-aside contracts and is aware that it is subject to criminal and civil penalties, including debarment, in the event of non-compliance.

3. The RFP shall contain a detailed notice to bidders advising the following:

i. The RFP includes a set-aside form (or forms) considered a mandatory requirement to be completed and included as a part of the bidder's proposal.

ii. Failure to complete and submit the form(s) shall be sufficient basis to deem the bid proposal non-responsive and thus subject to mandatory rejection.

iii. The set-aside form(s) completed by the bidder shall convey information in sufficient detail to permit the contracting agency to effectively assess the bidder's plan for attaining the specified set-aside goal or documenting the bidder's good faith effort to meet the set-aside goal.

4. The award of any contract subject to set-aside goals shall be made, in accordance with the State contracting agency's applicable statutes, rules and procedures, to the bidder whose proposal meets or demonstrates a good faith effort to meet the set-aside goals.

Amended by R.1995 d.224, effective May 1, 1995.
See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

12A:10-4.2 Good faith efforts of bidders; requirements

(a) The following actions shall be taken by a bidder in establishing a good faith effort to solicit and award subcontracts to eligible small businesses, minority businesses or female businesses, as established in the RFP:

1. The bidder shall attempt to locate qualified potential small, minority or female business subcontractors;
2. The bidder shall request a listing of small, minority or female businesses from the State contracting agency if none are known to the bidder;
3. The bidder shall keep a record of its efforts, including the names of businesses contacted and the means and results of such contacts;
4. The bidder shall provide all potential subcontractors with detailed information regarding the specifications; and
5. The bidder shall attempt, wherever possible, to negotiate prices with potential subcontractors submitting higher than acceptable price quotes.

(b) Bidders shall maintain adequate records to document their efforts.

Amended by R.1995 d.224, effective May 1, 1995.
See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

12A:10-4.3 Exemptions from set-aside program

In those circumstances where Federal law or regulations permit or require a procurement procedure other than those prescribed herein, the State contracting agency may follow the Federal procedures notwithstanding the provisions of these regulations, provided that the State contracting agency issues a written declaration that such Federal laws are in effect.

SUBCHAPTER 5. PLANNING, REPORTING AND REVIEW

12A:10-5.1 Planning

(a) No later than 60 calendar days before the start of each fiscal year, each State contracting agency shall submit

to the Commissioner of the Department of Commerce a plan for the coming fiscal year to comply with the set-aside program established by these rules. The Department of Commerce will assist any State contracting agency in the development of its plan, upon request.

1. The plan shall include a list of all known procurements and reprocurments scheduled to be bid during that fiscal year, including the following information:

- i. The name of the products or services covered by the contract;
- ii. The expiration date of the current contract and the estimated date of the public bid;
- iii. The term or duration of the contract;
- iv. The estimated dollar value of the contract or the amount expended to date on the current contract;
- v. The contracts that the agency intends to set aside in each set-aside category, i.e., small business, minority business and female business;
- vi. The contracts which have been identified as appropriate for set-aside subcontracting goals;
- vii. In addition to the requirements in i through vi above, the Division of Purchase and Property shall identify those multi-source term contracts included in the Cooperative Purchasing Program and indicate which of the multi-source contracts will be set-aside in their entirety, entirely and which will contain select line items set aside for small businesses, minority businesses or female businesses.

2. Each State contracting agency, with the exception of the Division of Purchase and Property, shall include a list of those products and services typically purchased under the bidding threshold, identifying those deemed appropriate for inclusion in the set-aside program.

i. Each State department served by the Division of Purchase and Property shall provide the Department of Commerce with a list of those products and services typically purchased pursuant to its delegated purchasing authority, or with a list of those products and services purchased during the preceding fiscal year under that authority.

3. Each State contracting agency shall list contracts awarded as the result of Waivers of Advertising, i.e., contracts with sole source suppliers such as water companies, gas and electric companies.

4. Each State contracting agency shall quarterly update its set-aside plans with a list of line item contracts not included in its initial procurement schedules, containing the same information required by N.J.A.C. 17:13-5.1(a)1 (12A:10-5.1(a)1).

5. Copies of contracting plans shall be available for review during normal business hours in the office of each State contracting agency.

(b) The Department of Commerce shall review the plan to determine whether it is reasonably designed to achieve the State contracting agency's goal of awarding 15 percent of its total contracting dollars to small businesses, seven percent of its total contracting dollars to minority businesses and three percent of its total contracting dollars to female businesses.

12A:10-5.2 Reporting requirements

(a) Within 30 calendar days of the end of each State contracting agency's fiscal quarters, the agency shall file with the Department of Commerce a report containing the following information prescribed by the Department:

1. The total number and dollar value of all contracts advertised and awarded, delineating which of these contracts and the percentages that were advertised and awarded as small business, minority business or female business set-aside contracts;

i. The State contracting agencies, in determining compliance with the set-aside goals for the three categories, shall count only those contracts awarded as a result of set-aside designations and only for the categories designated. For example, if an agency sets aside a contract for small businesses and the contract is awarded to a small business owned by a minority woman, that contract can be counted only as a small business award and not as a minority business or a female business award. If a registered small business, minority business or female business is awarded a contract that was not set aside, that contract cannot be counted as a set-aside award but shall be counted toward attainment of the agency's overall goal.

ii. The Division of Purchase and Property shall include a list of multi-source contracts which contain lines set aside for small business, minority business and female business, and those contracts extended through the Cooperative Purchasing Program.

2. The total number and dollar value of all advertised and awarded contracts which included subcontract requirements, setting forth the number and dollar value of subcontracts awarded to small businesses, minority businesses and female businesses, respectively.

3. Each State department served by the Division of Purchase and Property shall report the total number and dollar value of all purchases made under its delegated purchasing authority, delineating purchases and percentages made from small businesses, minority businesses and female businesses, respectively.

4. A description of efforts made by the State contracting agency to conduct outreach and educational programs for potential eligible small businesses, minority businesses and female businesses and any efforts made to assist the business community in achieving the objectives of these programs.

(b) Within 90 calendar days of the close of each State contracting agency's fiscal year, the agency shall file with the Department of Commerce, in a format prescribed by the Department, an analysis of actual contracting dollars paid to all contractors and actual contracting dollars paid to small businesses, minority businesses and female businesses, pursuant to set-aside contracts and subcontracts.

(c) All reports required by this subchapter shall be considered public records for the purposes of N.J.S.A. 47:1A-1 et seq. and shall be retained as part of the permanent records of the State contracting agency and the Department of Commerce.

Amended by R.1995 d.224, effective May 1, 1995.
See: 27 N.J.R. 52(a), 27 N.J.R. 1811(b).

12A:10-5.3 Annual review

The Commissioner of the Department of Commerce and the Treasurer of the State of New Jersey shall undertake an annual review of the operation and report to the Governor on the need for continuation or modification of the small, minority and female business set-aside programs contained in this chapter. This report shall be based upon the reports submitted to the Department and any other information deemed appropriate. The report will include performance data on compliance and deficiencies for each contracting agency and be publicly distributed as deemed appropriate.