

CHAPTER 14

**MINORITY AND FEMALE CONTRACTOR AND
SUBCONTRACTOR PARTICIPATION IN
STATE CONSTRUCTION CONTRACTS**

Authority

N.J.S.A. 10:5-36(k) and (o), 52:17 et seq., 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.200, effective March 27, 1998.
See: 30 N.J.R. 603(a), 30 N.J.R. 1425(a).

Chapter Expiration Date

In accordance with N.J.S.A. 52:14B-5.1c, Chapter 14, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, expires on September 22, 2003. See: 35 N.J.R. 1841(a).

Chapter Historical Note

Chapter 14, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was adopted jointly with the Department of Commerce, Energy and Economic Development as a part of Emergency R.1989 d.481, effective August 14, 1989 (expired October 13, 1989). Adopted concurrent new rules were filed on October 13, 1989 as R.1989 d.554. 21 N.J.R. 2810(a), 21 N.J.R. 3545(b).

Subchapter 1, formerly Minority and Female Subcontractor Participation in State Construction Contracts, was redesignated as Purpose, Scope and Definitions by R.1994 d.310, effective January 3, 1995. See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a). Subchapters 2, 3, 4 and 5 were adopted as R.1994 d.310, effective January 3, 1995. See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

The expiration date of Chapter 14, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, 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 14, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was readopted as R.1995 d.225, effective March 30, 1995. See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

Pursuant to Executive Order No. 66(1978), Chapter 14, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was readopted as R.1998 d.200, effective March 27, 1998. See: Source and Effective Date.

Cross References

Minority and female business participation in department of transportation construction contracts, see N.J.A.C. 16:4.

Urban Development Corporation, women-owned and minority-owned businesses, compliance with rules under this chapter for projects receiving financial assistance from the Corporation, see N.J.A.C. 12A:80-1.7.

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).

CHAPTER TABLE OF CONTENTS

SUBCHAPTER 1. PURPOSE, SCOPE AND DEFINITIONS

- 17:14-1.1 Purpose and scope
- 17:14-1.2 Definitions
- 17:14-1.3 through 17:14-1.12 (Reserved)

SUBCHAPTER 2. ELIGIBILITY REQUIREMENTS FOR MINORITY AND FEMALE BUSINESSES

- 17:14-2.1 Standards of eligibility for minority businesses and female businesses
- 17:14-2.2 Obligation to provide information and penalties for failure to provide complete and accurate information
- 17:14-2.3 Right to hearing upon denial of contract

SUBCHAPTER 3. CERTIFICATION AND REGISTRATION

- 17:14-3.1 Certification and registration procedures for minority businesses and female businesses
- 17:14-3.2 Time for application to register as a minority business or female business
- 17:14-3.3 Procedures for challenging a business registered as a minority business or female business

SUBCHAPTER 4. STATE AGENCY SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAMS

- 17:14-4.1 Remedial set-aside program goals and procedures
- 17:14-4.2 Non-remedial subcontracting target program and procedures
- 17:14-4.3 Good faith efforts of bidders; requirements
- 17:14-4.4 Exemptions from set-aside programs

SUBCHAPTER 5. PLANNING, REPORTING AND REVIEW

- 17:14-5.1 Planning
- 17:14-5.2 Reporting requirements
- 17:14-5.3 Annual review

SUBCHAPTER 1. PURPOSE, SCOPE AND DEFINITIONS

17:14-1.1 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 seven percent of public construction contracts and subcontracts to eligible minority-owned businesses and three percent of public construction contracts and subcontracts to eligible female-owned 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 construction contracts awarded by any State contracting agency and are not applicable to the award of State contracts for the purchase of goods and services not related to construction contracts.

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

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

New Rule, R.1994 d.310, effective January 3, 1995.
 See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

17:14-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

“Certification” means that a minority-owned or woman-owned business has been authenticated as being at least 51 percent owned and controlled either by minorities or females for participation in State programs requiring 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.

“Construction contract” means any contract to which the State or any State contracting agency is a party involving any construction, renovation, reconstruction, rehabilitation, alteration, conversion, extension, demolition, repair or other changes or improvements of any kind whatsoever of any public structure or facility or highway. The term also includes contracts for consultant services, the supervision, inspection and other functions incidental to actual construction.

“Consultant” means an architect, engineer, construction manager, or other consultant providing technical and professional services in support of a design or construction or highway project.

“Contractor” means any party performing or offering to perform a construction contract or consultant contract, or any party providing materials or goods used to perform a construction contract issued by a contracting agency of the State of New Jersey.

“Delegated purchasing authority” means the authority of a State agency to award contracts on its own pursuant to authority delegated to it by the Director, Division of Building and Construction, as established in N.J.S.A. 52:34-7.

“Division of Building and Construction” means the State agency within the Department of the Treasury which provides a centralized design and construction contract procurement and administration service for other State agencies pursuant to N.J.S.A. 52:18A-151 et seq.

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

“Minority business” means a business which has its principal place of business in the State, is independently owned and operated and is at least 51 percent 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 people of the Far East, southeast Asia, and Indian subcontinent, Hawaii or the Pacific Islands.

“Non-remedial targets” means numerical objectives which a State contracting agency may establish in lieu of or as a supplement to the remedial goals to ensure that discrimination is not presently occurring on publicly funded construction projects.

“Registration” means the process by which any business can have its eligibility for participation in minority and female set-aside determined.

“Remedial goals” means the statutorily determined percentages of contracts awarded by each State contracting agency to eligible minority and female businesses in order to eradicate the effects of past discrimination.

“Set-aside contract” means a contract, or subcontractable portion of a contract when that portion is so allocated, specifically designated by a contracting agency as exclusively available for award to either an eligible minority or female business.

“State contracting agency” means any board, commission, committee, authority or agency of the State which possesses the legal authority to award and make construction contracts and includes the following except where expressly inconsistent with statutory authority:

1. DEPARTMENTS

Agriculture
 Banking
 Commerce and Economic Development
 Community Affairs

Corrections
 Education
 Environmental Protection
 Health
 Higher Education
 Human Services
 Insurance
 Labor
 Law and Public Safety
 Military and Veterans' Affairs
 Personnel
 Public Advocate
 State
 Transportation
 Treasury

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
 Pinelands Commission
 State Commission of Investigation
 Commission of Science and Technology and all other departments, colleges, authorities and commissions as may be established in the future.

2. COLLEGES

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
 Rowan College of New Jersey
 Rutgers, The State University
 Thomas A. Edison College
 Trenton State College
 University of Medicine and Dentistry of New Jersey
 William Paterson College of New Jersey

“Subcontractor” means a third party that is engaged by a contractor to perform all or part of the work or to provide supplies, materials or equipment included in a construction-related contract with a State contracting agency.

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

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.
 Administrative Correction to (a): change reference.
 See: 22 N.J.R. 1150(a).
 Recodified from 17:14-1.1 and amended by R.1994 d.310, effective January 3, 1995.
 See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
 Formerly “Applicability and scope”.
 Amended by R.1995 d.225, effective May 1, 1995.
 See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

3. AUTHORITIES

Board of Regulatory Commissioners
 Casino Reinvestment Development Authority
 Development Authority for Small Businesses, Minorities and Women’s Enterprises
 N.J. Building Authority
 N.J. Economic Development Authority
 N.J. Educational Facilities Authority
 N.J. Health Care Facilities Financing Authority
 N.J. Highway Authority
 N.J. Housing & Mortgage Finance Agency
 N.J. Sports and Exposition Authority
 N.J. Transit Corporation
 N.J. Turnpike Authority
 N.J. Water Supply Authority
 Public Broadcasting Authority
 South Jersey Transportation Authority
 Urban Development Corporation

Case Notes

Minority set-aside provisions in the Casino Control Act violated equal protection, as statutory definition of minorities was not narrowly tailored; definition included minorities not found to have been subject to discrimination, and adoption of regulations limiting definition of minorities to African-Americans, Latinos, and Asian Americans could not cure defect, as Casino Redevelopment Authority did not have authority to deviate from statutorily-defined minorities eligible for inclusion in set-aside program. *L. Feriozzi Concrete Company v. Casino Reinvestment Development Authority*, 776 A.2d 254 (2001).

Overinclusiveness in the Casino Control Act’s minority set-aside program, based on inclusion in set-aside program of minorities who were not found to have been subject to discrimination, could not be cured by striking portions of statute and rewriting definitional scheme, where there were inconsistencies among pertinent statutes and regulations as to which minorities would be entitled to be included in set-aside program. *L. Feriozzi Concrete Company v. Casino Reinvestment Development Authority*, 776 A.2d 254 (2001).

17:14-1.3 (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 “Standards of eligibility for minority business and female business”.

17:14-1.4 (Reserved)

Repealed by R.1994 d.310, effective January 3, 1995.

4. COMMISSIONS

Beach Erosion Commission

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

Formerly "Registration procedures for minority businesses and female businesses".

17:14-1.5 (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 "Approval as a minority business or female business".

17:14-1.6 (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 amendment R.1989 d.481 readopted with changes.

Administrative Correction to (c).

See: 21 N.J.R. 3674(b).

Repealed by R.1994 d.310, effective January 3, 1995.

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

Formerly "Time for application to register as a minority business or female business".

17:14-1.7 (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 "Procedures for challenging a business registered as a minority business or female business".

17:14-1.8 (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 amendment 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".

17:14-1.9 (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 amendment 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".

17:14-1.10 (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 amendment 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".

17:14-1.11 (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".

17:14-1.12 (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 2. ELIGIBILITY REQUIREMENTS FOR MINORITY AND FEMALE BUSINESSES

17:14-2.1 Standards of eligibility for minority businesses and female businesses

(a) A business may be eligible for designation as a minority business, a female business, or both.

(b) 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;
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.

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

Recodified from 17:14-1.3 and amended by R.1994 d.310, effective January 3, 1995.

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

17:14-2.2 Obligation to provide information and penalties for failure to provide complete and accurate information

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

(b) When a business has been approved as an eligible female business or minority business on the basis of false information knowingly supplied by the business and the business has been awarded a contract or subcontract on a State construction contract, 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. 17:27, 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 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.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

17:14-2.3 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.225, effective May 1, 1995.
See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

SUBCHAPTER 3. CERTIFICATION AND REGISTRATION

17:14-3.1 Certification and registration procedures for 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 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.

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

2. When an application for registration as a female or minority 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 female or minority vendors list.

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

Recodified from 17:14-1.4 and 1.5 and amended by R.1994 d.310, effective January 3, 1995.

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

Amended by R.1995 d.225, effective May 1, 1995.

See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

Amended by R.1997 d.52, effective February 3, 1997.

See: 28 N.J.R. 1184(b), 29 N.J.R. 447(a).

In (a), deleted reference to December 1, 1995 as an alternative filing deadline.

17:14-3.2 Time for application to register as a minority business or female business

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

(b) If a business is to be considered as a minority or female business contractor or subcontractor on a specific contract for 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 17:14-1.6 and amended by R.1994 d.310, effective January 3, 1995.

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

17:14-3.3 Procedures for challenging a business registered as a minority business or female business

(a) The qualification under these rules of a business on a vendors list as a 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 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 vendor's eligibility shall not stay the contract award process.

Recodified from 17:14-1.7 and amended by R.1994 d.310, effective January 3, 1995.

See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

SUBCHAPTER 4. STATE AGENCY SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAMS

17:14-4.1 Remedial 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 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.

(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. Contracts executed under delegated purchasing authority shall be subject to set-aside provisions established by the delegating agency in its formal delegation procedures. Consistent with the requirements of N.J.S.A. 52:32-17 et seq., the 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 or subcontracts will be offered as set-aside contracts.

i. A contract or subcontract 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 construction work or services.

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

(c) When an 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 minority businesses or to 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 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. 17:14-4.3 (12A:10A-4.3), must be met by any contractor receiving an award.

2. The bid documents 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 bid documents shall contain a detailed notice to bidders advising the following:

i. The bidding packet includes a set-aside form or forms considered a material and mandatory requirement and which must 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.

iv. The Department of Commerce's lists of eligible minority and female businesses will be available from the State contracting agencies.

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.225, effective May 1, 1995.
See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

17:14-4.2 Non-remedial subcontracting target program and procedures

(a) When it deems appropriate, any State contracting agency, consistent with its contracting authority, may establish and administer a non-remedial target program in lieu of or as a supplement to the remedial set-aside program. This non-remedial program shall be designed to ensure that discrimination is not presently occurring on publicly funded construction projects, as evidenced by a bidder's good faith efforts to solicit price quotes from or enter into contracts with eligible businesses.

(b) Each State contracting agency shall establish written procedures and maintain records as necessary to define, document and report subcontracts awarded pursuant to this program. The 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 are suitable for the subcontracting target program.

i. Factors to be considered when making the determination that a particular contract is suitable for inclusion in this program include, but are not limited to: the total dollar amount of the project, the use of a general construction contractor for the completion of the entire project and the number of available eligible businesses in geographical proximity to the project site.

ii. The designation of a particular contract as part of the non-remedial target program shall be made prior to the public advertisement for bids.

(c) The State contracting agency shall set separate target levels, to be no less than the remedial target levels, for the participation of minority and female business subcontractors for each construction contract awarded pursuant to this program. The target levels shall be set according to the following procedures:

1. The State contracting agency shall make a determination of the subcontractable elements of the contract based upon the agency's breakdown of projected trade disciplines or work components of the contract and the estimated costs of those individual elements.

2. For each subcontractable element, the State contracting agency shall review the appropriate vendor list of the Department of Commerce to determine the number of eligible minority businesses and the number of eligible female businesses which may reasonably be expected to participate in the project, giving consideration to the geographic location of the project and the estimated dollar value of the subcontract.

3. The subcontractable elements where there are fewer than three minority businesses or three female businesses reasonably expected to participate in the contract will be eliminated from consideration for inclusion in the target.

4. Those subcontractable elements having the greatest availability of minority or female businesses will be considered for inclusion in the target.

5. The total dollar value of the subcontractable elements with the greatest likelihood of participation by minority or female businesses shall be combined. The percentage of the total dollar value of the contract that this combined amount represents shall be used as a guide by the State contracting agency to set a reasonable target for overall minority business participation in subcontracted elements of the contract but in no event shall exceed 50 percent of the subcontracted elements.

6. This same procedure shall be followed for setting a reasonable target for female business participation in the contract.

(d) Nothing in these rules shall be construed as requiring or permitting a State contracting agency to depart from its statutory restrictions or documented policies governing the percentage of a contract which may be subcontracted.

(e) The public advertisement shall include a notice to prospective bidders disclosing the target levels for the contract.

(f) The bid documents shall contain a detailed notice to bidders advising of the following:

1. The bidding package includes a minority and female business utilization form or forms considered a material and mandatory requirement which must be completed and included as part of the bidder's proposal.

2. Failure to complete and submit the form or forms shall be sufficient basis to deem the proposal non-responsive and thus subject to mandatory rejection.

3. The minority and female business utilization plan will be used by the State contracting agency to determine,

prior to award, whether the bidder's proposal is reasonably designed to meet the targets.

(g) A bidder's proposal identifying contracts for minority and female businesses, the combined cost estimates of which meet the targets, will be deemed to have non-discriminatory subcontracting practices.

(h) A bidder's proposal failing to identify contracts for minority and female businesses with a combined cost estimate meeting the targets shall include documentation of the bidder's good faith efforts to meet the targets. Documentation must include a record of the bidder's attempts to contract with eligible businesses and the reasons for failure to meet the targets.

1. The State contracting agency shall review this documentation in order to determine whether the bidder made reasonable efforts to solicit and award contracts to eligible minority and female businesses.

i. In order to make the required determinations, the State contracting agency will review the method by which subcontractors were selected to ensure uniformity in approach and to ensure that no disparate treatment has occurred. The State contracting agency will consider the bidder's actions taken pursuant to N.J.A.C. 17:14-4.3 (12A:10A-4.3) in determining whether reasonable efforts were made by the bidder to solicit and award subcontracts to eligible minority and female businesses.

(i) The award of any contract pursuant to this program 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 genuine good faith effort to meet the targets.

Amended by R.1995 d.225, effective May 1, 1995.
See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

17:14-4.3 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 minority and female businesses:

1. The bidder shall attempt to locate qualified potential minority and/or female business subcontractors;
2. The bidder shall request a listing of minority and/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 attempt to contact all potential subcontractors on the same day and use similar methods to contact them;

5. The bidder shall provide all potential subcontractors with detailed information regarding the specifications; and

6. The bidder shall attempt, wherever possible, to negotiate prices with potential subcontractors which submitted higher than acceptable price quotes.

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

Amended by R.1995 d.225, effective May 1, 1995.
See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

Cross References

State contracts, set-aside programs, solicitation of bids as under this section, see N.J.A.C. 12A:10A-4.2.

State contracts, set-aside programs, public advertisement as under this section, see N.J.A.C. 12A:10A-4.1.

17:14-4.4 Exemptions from set-aside programs

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 rules, provided that the State contracting agency issues a written declaration that such Federal laws are in effect.

SUBCHAPTER 5. PLANNING, REPORTING AND REVIEW

17:14-5.1 Planning

(a) Within 60 calendar days of the finalization of the capital budget for each State contracting agency, that agency shall submit to the Commissioner of the Department of Commerce a plan for complying with the remedial and/or non-remedial programs as established by these rules. The Department of Commerce will assist any State contracting agency in the development of its plan, upon request. This plan shall include the following:

1. A list of all construction contracts scheduled and funded for that year, identifying the estimated cost of each project;
2. Identification of those contracts which the State contracting agency intends to include in its remedial goal program; and
3. Identification of those contracts which the State contracting agency intends to include in its non-remedial target program.

(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 seven percent of its total contracting dollars to minority businesses and three percent of its total contracting dollars to female businesses.

17:14-5.2 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 minority or female business set-aside contracts;

i. The State contracting agencies, in determining compliance with the set-aside goals for the two 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 woman-owned business and the contract is awarded to a business owned by a minority woman, that contract can be counted only as a woman-owned business award and not as a minority business award. If a registered minority business, or female business was 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.

2. The total number and dollar value of all contracts advertised and awarded subject to the remedial subcontract set-aside program, setting forth the number and dollar value of subcontracts awarded to minority and female businesses, respectively;

3. The total number and dollar value of all contracts advertised and awarded subject to the non-remedial target program, setting forth the number and dollar value of subcontracts awarded to minority and female businesses, respectively; and

4. A description of efforts made by the State contracting agency to conduct outreach and educational programs for potentially eligible minority 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 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.225, effective May 1, 1995.
See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

17:14-5.3 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 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.