

CHAPTER 4

MINORITY BUSINESS AND FEMALE BUSINESS PARTICIPATION IN DEPARTMENT OF TRANSPORTATION CONSTRUCTION CONTRACTS

Authority

N.J.S.A. 27:1A-5, 27:1A-6 and 27:1B-24.

Source and Effective Date

R.1996 d.436, effective August 22, 1996.
See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Executive Order No. 66(1978) Expiration Date

Chapter 4, Minority Business and Female Business Participation in Department of Transportation Construction Contracts, expires on August 22, 2001.

Chapter Historical Note

Chapter 4, Disadvantaged Business and Female Business Participation in State Construction Contracts as Subcontractors, was adopted as R.1991 d.477, effective September 16, 1991 (operative October 29, 1991). See: 22 N.J.R. 2898(a), 23 N.J.R. 2872(a). Pursuant to Executive Order No. 66(1978), Chapter 4, Minority Business and Female Business Participation in Department of Transportation Construction Contracts, was readopted as R.1996 d.436, effective August 22, 1996. See: Source and Effective Date. See, also, section annotations.

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SUBCHAPTER 1. GENERAL PROVISIONS

16:4-1.1 Definitions

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

“Certification” means that a minority-owned or female-owned business has been authenticated as being at least 51 percent owned and controlled either by minorities or females.

“Commissioner” means the Commissioner of the Department of Transportation of the State of New Jersey, acting directly or through his or her duly authorized representatives, such representatives acting within the scope of the particular duties delegated to them.

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

“Contract” means any contract funded by 100 percent State funds to which the Department of Transportation of the State of New Jersey is a party and which involves any construction, renovation, reconstruction, rehabilitation, alteration, conversion, extension, demolition, repair or other changes or improvements of any kind whatsoever to any transportation project or facility. The term also includes contracts for consultant services, including design, supervision, inspection and other on-site functions incidental to actual construction, including, but not limited to, materials, equipment, and supplies.

“Contractor” means any party performing or offering to perform a contract or consultant contract, or any party providing materials, goods, or services used to perform a contract issued by the Department.

“Decertification” means the process by which a previously certified minority-owned or female-owned business, now failing to meet the requirements for continued certification, shall be removed from the program.

“Department” means the Department of Transportation of the State of New Jersey.

“Female business” means a sole proprietorship, partnership or corporation:

1. Which is owned by women or in the case of a publicly owned business, at least 51 percent of the stock of which is owned by women; and
2. Whose management and daily business operations are controlled by women who own it.

“Minority” is 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 Asian, and Indian subcontinent, Hawaii or the Pacific Islands.

“Minority business” means a sole proprietorship, partnership, or corporation:

1. Which is at least 51 percent owned by one or more minorities, or in the case of any publicly owned business, at least 51 percent of stock of which is owned by one or more minorities; and

2. Whose management and daily business operations are controlled by one or more minorities who own it.

“Recertification” means the annual process utilized by the Department to ensure that a certified minority-owned or female-owned business continues to meet the requirements of the program.

“Subcontractor” means a party that is engaged by a contractor to perform services in support of a transportation project or to provide supplies, materials or equipment included in a construction related contract with the Department.

Amended by R.1996 d.436, effective September 16, 1996.
See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Added “Certification”, “Consultant”, “Decertification”, “Minority”, “Minority business and Recertification”; replaced “Construction contract” with “Contract”; deleted “Disadvantaged business”, “Socially and economically disadvantaged individuals” and “Work”; and amended “Contractor” and “Subcontractor”.

16:4-1.2 Applicability

(a) These rules apply only to Department contracts funded with 100 percent State funds and are not applicable to the award of Department contracts for the purchase of goods and services.

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

Division of Civil Rights/Affirmative Action
Department of Transportation
1035 Parkway Avenue
CN 600
Trenton, New Jersey 08625

Amended by R.1996 d.436, effective September 16, 1996.
See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

In (a) substituted contracts for construction contracts and in (b) substituted “minority” for “disadvantaged”.

16:4-1.3 Standards of eligibility for minority business and female business

(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 the definition of a minority or female business in N.J.A.C. 16:4-1.1.

(c) The certification by the Department of a business as a Disadvantaged Business Enterprise, pursuant to the requirements of 49 C.F.R. Part 23 establishing the Disadvantaged Business Enterprise Program for Federally funded contracts, may qualify the business to participate in the Department’s Minority and Female Business Program. In order for a business to qualify for participation in the Department’s program, the business shall specifically meet the definition of “minority” for a “minority business” or “female business” as defined in N.J.A.C. 16:4-1.1 and all other requirements of this chapter.

Amended by R.1996 d.436, effective September 16, 1996.
See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Rewrote section.

16:4-1.4 Certification procedures for minority business and female business

(a) A business may apply to the Department at any time to be certified as a minority business or female business. Such application must be made on the application form supplied by the Department.

(b) If a business is to be considered as a minority business or female business for the purpose of meeting the target levels for a specific contract, the business must be certified by the Department. In the event a business is not certified with the Department, the complete certification application must be received by the Division of Civil Rights/Affirmative Action at least 15 calendar days prior to bid. It shall be the contractor’s responsibility to notify the Division if certification is required for a specific contract currently being bid.

(c) As part of its application to the Department, a business shall document its independent status and character of its ownership and control to the satisfaction of the Department. All applications must be completed in their entirety before they will be considered by the Commissioner.

1. Failure by the applicant to supply additional information as requested by the Department within 15 days of the request shall result in the application being returned without processing to the applicant.

2. If an applicant knowingly supplies false or inaccurate information, the applicant shall be disqualified under these rules, and may be subject to further penalties as provided by law.

(d) All firms wishing to participate in the Department's target program pursuant to this regulation, or any contract advertised by the Department for its set-aside program pursuant to Department of Treasury and Commerce rules (N.J.A.C. 12A:10A and N.J.A.C. 17:14) must be certified in accordance with this chapter.

Amended by R.1996 d.436, effective September 16, 1996.

See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Rewrote section.

16:4-1.5 Approval or rejection as a minority business or female business

(a) When an applicant is approved by the Commissioner as a minority business or female business, the business will be notified in writing of such certification. The certification shall be effective as of the date of approval and said certification shall be valid for one year unless revoked by the Commissioner. Businesses shall be required to reapply each year for recertification as minority or female businesses.

(b) When an applicant is rejected as a minority or female business, it shall be notified in writing of the reasons for that decision. The applicant may appeal to the Department in writing within 20 days of the receipt of said notice. No applicant shall be eligible to participate in the program during the pendency of its appeal and the rejected applicant may not be used by a contractor to satisfy the target during the pendency of the appeal.

(c) When a certified business is decertified, the business shall be notified in writing of the reasons for that decision. The business may appeal to the Department in writing within 20 days of the receipt of said notice. The business shall be eligible to participate in the program during the pendency of its Departmental appeal.

(d) If an applicant appeals the rejection/denial of its application, the Department shall schedule a meeting at which time the applicant may present additional information in support of its application. This additional information shall be reviewed by the Commissioner and the applicant shall be notified of the Commissioner's approval or rejection in writing within 30 State business days of the meeting.

(e) If, at any time, the Department has reason to believe that there has been a change in the ownership or control of a minority or female business which has been certified for participation in the program, the Department may request that business demonstrate its continued eligibility for participation in the program. Businesses failing to demonstrate such continued eligibility to the satisfaction of the Commissioner shall have their certification revoked, and shall be ineligible to reapply to the program for one year.

Amended by R.1996 d.436, effective September 16, 1996.

See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Rewrote section.

16:4-1.6 Subcontracting targets

(a) The Department shall set target levels for participation of minority businesses and female businesses as subcontractors for each contract.

(b) Each contractor submitting a bid or proposal for a contract shall include the subcontracting target information in the form and at the time required by the bid or proposal.

(c) If the target levels are met by the contractor, the contractor will be presumed not to be engaging in unlawful race and sex discrimination in the selection of subcontractors and will be presumed to have engaged in reasonable outreach efforts.

(d) If the target levels are not satisfied by a contractor, the Department shall review the subcontracting practices of the contractor to determine if it has engaged in unlawful race or sex discrimination in the selection of subcontractors and to determine if it has engaged in reasonable outreach efforts. If the review does not indicate that the contractor has engaged in unlawful race or sex discrimination and does indicate that reasonable outreach efforts have been made, the bid or proposal will not be rejected for the reason of race or sex discrimination. If it is determined that the contractor has engaged in unlawful race or sex discrimination, the bid or proposal may be rejected and the contractor subject to such other penalties as are provided by law, including suspension, debarment or reduced classification.

(e) A contractor which fails to meet the target levels for minority and female business shall document the reasonable outreach efforts it made to meet the targets. Reasonable outreach efforts shall include, but not be limited to:

1. Attendance at a pre-bid or pre-proposal meeting, if any, scheduled by the Department to inform potential contractors and minority and female businesses of subcontracting opportunities under a given solicitation;

2. Solicitations of minority and female businesses as subcontractors for the project, including advertisements in general circulation media, trade association publications, and minority focus media. Such solicitations shall be made at a sufficient length of time before the date set for receipt of bids to permit a meaningful response from minority and female businesses. Contractors shall maintain records regarding each minority or female business contacted as a potential subcontractor and the reasons why that business was not used by the contractor;

3. Efforts made to identify contract categories capable of being performed by minority or female businesses;

4. Efforts made to use the services of available community organizations, contractor groups and local, State, and Federal agencies that provide assistance in the recruitment and placement of minority and female businesses.

(f) In determining whether a contractor has satisfied the target levels, the award of a subcontract may count toward only one target. For example, the award of a subcontractor to a business owned by a black woman may be counted either toward the minority business target or the female business target.

Amended by R.1996 d.436, effective September 16, 1996.

See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Substituted "minority" for "disadvantaged", substituted contractor for bidder, added references to proposals, and in (b) substituted contract for construction contract.

16:4-1.7 Counting minority or female business participation

(a) The total dollar value of all expenditures for work performed on the contract by businesses which have been certified by the Department as minority or female businesses shall count toward the target established for the contract; however, the contractor may only count 60 percent of its expenditures to minority or female suppliers that are not manufacturers.

(b) The contractor may only count toward the contract target those expenditures to certified minority or female businesses which perform a commercially useful function. A commercially useful function is performed when the certified minority or female business is responsible for execution of a distinct element of the work of the contract and carrying out its responsibility by actually performing, managing and supervising this element of work. The amount of work subcontracted, industry practice and other relevant factors shall be reviewed to determine whether a commercially useful function is being performed.

(c) Payments made to the contractor for work performed by non-minority or non-female businesses shall not be applied toward the target.

New Rule, R.1997 d.76, effective February 18, 1997.

See: 28 N.J.R. 5057(b), 29 N.J.R. 613(a).

Former section recodified to N.J.A.C. 16:4-1.8.

16:4-1.8 Responsibility after award

(a) The contractor shall advise the Department of any change regarding the transportation project work to be performed by a minority or female business, which it intends to use to meet the target.

(b) If a minority or female business which was to be used by the contractor to meet the target does not perform the work, the contractor shall attempt to replace that minority or female business with another female or minority business provided the contractor first obtains the written consent of the Division of Civil Rights/Affirmative Action to ensure adherence to this chapter. The contractor shall submit in writing to the Division of Civil Rights/Affirmative Action the request to replace the original minority or female business. Work in the category concerned shall not begin until such approval is granted. If the contractor fails to replace the business with a female or minority business, it shall document to the Department the reason for such a failure and the Department shall review the contractor's subcontracting practices to determine if it is engaging in unlawful race or sex discrimination.

(c) If a contractor is found to have engaged in unlawful race or sex discrimination, it may be subject to all penalties provided by law. Additionally, the contractor may be subject to suspension, debarment, termination, or reduced classification.

Amended by R.1996 d.436, effective September 16, 1996.

See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Rewrote (a) and (b).

Recodified from 16:4-1.7 by R.1997 d.76, effective February 18, 1997.

See: 28 N.J.R. 5057(b), 29 N.J.R. 613(a).

Former section recodified to N.J.A.C. 16:4-1.9.

16:4-1.9 Severability

If any section, subsection, provision, clause or portion of this subchapter is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this subchapter shall not be affected thereby.

Recodified from 16:4-1.8 by R.1997 d.76, effective February 18, 1997.

See: 28 N.J.R. 5057(b), 29 N.J.R. 613(a).

Former section recodified to N.J.A.C. 16:4-1.10.

16:4-1.10 Review

The operation of the program contained in this subchapter and the need for its continuation shall be reviewed by the Commissioner annually.

Amended by R.1996 d.436, effective September 16, 1996.

See: 28 N.J.R. 3523(a), 28 N.J.R. 4232(b).

Deleted "construction subcontract target level" preceding "program" and substituted an annual for a biennial review.

Recodified from 16:4-1.9 by R.1997 d.76, effective February 18, 1997.

See: 28 N.J.R. 5057(b), 29 N.J.R. 613(a).