

CHAPTER 10A

STATE CONSTRUCTION CONTRACTS
FOR SMALL BUSINESSES

Authority

N.J.S.A. 10:5-36(k) and (o), 52:17 et seq., 52:18A-30(d), 52:25-1 et seq., 52:27C-71(q), 52:27C-73(a), (f) and (h), 52:27H-6(f), 52:27H-21.24, 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.2003 d.381, effective September 4, 2003.
See: 35 N.J.R. 1841(a), 35 N.J.R. 4751(a).

Chapter Expiration Date

Chapter 10A, State Construction Contracts for Small Businesses, expires on September 4, 2008.

Chapter Historical Note

Subchapters 1, 2 and 3, were recodified from N.J.A.C. 12A:10-2, Minority and Female Subcontractor Participation in State Construction Contracts, and Subchapters 4 and 5 were adopted as new rules by 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 10A, 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 10A, 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 10A, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was readopted as R.1998 d.200, effective March 26, 1998. See: 30 N.J.R. 603(a), 30 N.J.R. 1425(a).

Chapter 10A, State Construction Contracts For Small Businesses, was adopted as R.2003 d.381, effective September 4, 2003. See: Source and Effective Date. See, also, section annotations.

Cross Reference

Special rules regarding disputes arising under the New Jersey Lemon Law, see N.J.A.C. 1:13A.

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SUBCHAPTER 1. PURPOSE, SCOPE AND
DEFINITIONS

12A:10A-1.1 Purpose and scope

(a) The rules in this chapter are jointly promulgated by the Commerce and Economic Growth Commission (hereinafter, "Commerce Commission") 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, in part, requires State agencies with contracting authority to make a good faith effort to award 15 percent of public construction contracts and subcontracts to eligible small businesses. This percentage goal is an overall program goal for each State contracting agency. State contracting agencies are expected to apply their business judgment when establishing set-aside 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 small business should be addressed to:

Set-Aside and Certification Office
Commerce and Economic Growth Commission
20 West State Street, PO Box 820
Trenton, New Jersey 08625-0820

New Rule, R.1994 d.310, effective January 3, 1995.
See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).
Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).
See: 35 N.J.R. 3694(a).
Rewrote (a) and (c).
Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.
See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-1.2 Definitions

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

“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 provider of 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 Property Management and Construction (DPMC), as established in N.J.S.A. 52:34-7.

“Division of Property Management and Construction (DPMC)” 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.

“Goal” means the statutorily determined percentage of contracts awarded by each State contracting agency to eligible small businesses in order to comply with the small business provisions of the Set-Aside Act.

“Registration” means the process by which any business can have its eligibility for participation in the Commerce Commission’s small business programs determined.

“Secretary” means the Chief Executive Officer and Secretary of the Commerce Commission or his or her designee.

“Set-aside contract” means a contract specifically designated by a contracting agency as exclusively available for award to an eligible small business.

“Small business” means a business which has its principal place of business in the State, is independently owned and operated, has no more than 100 full-time employees, and has gross revenues that do not exceed either \$1 million or the applicable annual revenue standards set forth in 13 CFR 121.201, whichever is higher.

“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 and Insurance

Personnel

Community Affairs

Corrections

Military and Veterans Affairs

Education

Environmental Protection

Health and Senior Services

Higher Education

Human Services

Labor

Law and Public Safety

State

Transportation

Treasury

2. COLLEGES:

New Jersey City University

Kean University

Montclair State University

New Jersey Institute of Technology

Ramapo College of New Jersey

Richard Stockton College of New Jersey

Rowan University

Rutgers the State University of New Jersey

The College of New Jersey

Thomas A. Edison State College

University of Medicine and Dentistry of New Jersey

William Paterson University 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

Commerce and Economic Growth Commission

County and Municipal Government Study Commission

Election Law Enforcement Commission

Executive Commission on Ethical Standards

New Jersey Meadowlands 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

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

5. MULTI-STATE AGENCIES:

Delaware River Basin Commission

Port Authority of New York and New Jersey

Delaware River Joint Toll Bridge Commission

Delaware River Port Authority

Delaware River and Bay Authority

Atlantic Interstate Low-Level Radioactive Waste Compact

Delaware Valley Regional Planning Commission

Interstate Environmental Commission

Palisades Interstate Park Commission

Waterfront Commission of New York Harbor

"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.

"Target" means the numerical objectives which a State contracting agency establishes, on a contract by contract basis, in order to meet its small business goal.

"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 new rule R.1989 d.481 readopted with changes.

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).

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

SUBCHAPTER 2. ELIGIBILITY REQUIREMENTS FOR SMALL BUSINESSES

12A:10A-2.1 Standards of eligibility for small businesses

(a) 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 position, 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 construction and construction-related services that are the subject of the specific contract for which the business wants to be eligible as a small business.

4. The business must have gross revenues that do not exceed \$1 million or the applicable annual revenue standards set forth in 13 CFR 121.201, whichever is higher.

i. Gross revenues of a business which has been in business for three or more completed years means the revenues of the business over its last three completed tax years divided by three.

ii. Gross revenues of a business which has been in business for less than three complete tax years means the revenues for the period the business has been in business divided by the number of weeks in business, multiplied by 52.

iii. Gross revenues of a business which has been in business three or more complete tax years but has a short year as one of those years means the revenues for the short year and the two full years divided by the number of weeks in the short year and the two full years, multiplied by 52.

(b) In addition to (a) above, the Commerce Commission may limit participation in its small business set-aside programs to businesses whose individual owners do not exceed \$750,000 in personal net worth.

(c) Eligibility is formalized by the Commerce Commission's registration and approval process.

(d) Small businesses will be registered in one of the following two categories:

1. Small businesses whose gross revenues do not exceed \$1 million; or

2. Small businesses whose gross revenues do not exceed the applicable annual revenue standards set forth in 13 CFR 121.201.

(e) Small businesses registered in the category in (d)1 above will be eligible to participate in set-aside contracts and subcontracting programs available to businesses registered in the categories in (d)1 and 2 above. Small businesses registered in the category in (d)2 above will be eligible to participate in set-aside contracts and subcontracting pro-

grams available to businesses registered in the category in (d)2 above only.

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

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Added (e).

12A:10A-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 Commerce Commission.

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote (a), (b)2 and (c).

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-2.3 (Reserved)

New Rule, R.1995 d.225, effective May 1, 1995.

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

Repealed by Emergency Amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Section was "Right to hearing upon denial of contract".

Adopted concurrent repeal, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

SUBCHAPTER 3. REGISTRATION

12A:10A-3.1 Registration procedures for small businesses

(a) Registration procedures established by the Commerce Commission are as follows:

1. Any business which seeks to register as a small business must apply to the Commerce Commission and pay a \$100.00 annual registration fee and a \$75.00 certification application fee. The \$75.00 certification application fee is pursuant to the period indicated in N.J.A.C. 12A:11-1.11. For these purposes, the Commerce Commission shall prepare a Vendor Registration Form. This form shall be available from the Commerce Commission and the State contracting agencies.

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

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

4. When an application for registration as a small business is approved by the Commerce Commission, the Commerce Commission will issue the newly registered business an approval notice and add it to the Commerce Commission's small vendors list.

5. 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).

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

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.

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-3.2 Time for application to register as a small business

(a) A business may apply to the Commerce Commission at any time to be registered as a small business and to be placed on the appropriate vendor list.

(b) If a business is to be eligible to bid on a specific set-aside contract or participate in the subcontracting target programs for purposes of these rules, it must be registered as a small business by the Commerce Commission on the date the bid or bid proposal is received and opened by the State contracting agency.

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.

Administrative Correction to (c).

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

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

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-3.3 Procedures for challenging a business registered as a small business

(a) The qualification under these rules of a business on a vendors list as a small 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 Commerce Commission, setting forth the factual basis for the challenge. The Commerce Commission 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 Commerce Commission shall also provide a copy of the challenge to the contracting agency.

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

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

1. The Commerce Commission 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 Commerce Commission 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 Secretary. This designee will issue a written report to the Secretary within four working days following the close of the hearing.

4. At the discretion of the Secretary'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 Secretary 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.

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

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Deleted minority and gender references throughout.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-3.4 Interim registration period

(a) A business registered as a small business or certified as a minority or female business by the Commerce Commission, as of July 8, 2003, shall be granted an interim registration by the Commerce Commission in one of the categories set forth in N.J.A.C. 12A:10A-2.1(d) (17:14-2.1(d)), if its gross revenues, as determined by information retrieved from a third party database, do not exceed the applicable annual revenue standards set forth in 13 CFR 121.201.

(b) A business shall retain its interim registration until it has submitted a Vendor Registration Form to the Commerce Commission and has been granted or denied approval as an eligible small business, or until December 31, 2003, whichever is earlier.

(c) During the interim registration period, a business shall be eligible to participate in all set-aside contracts and subcontracting programs available to businesses registered in its category.

New Rule, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

SUBCHAPTER 4. SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAMS

12A:10A-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 to be awarded to eligible small businesses, as follows: at least five percent shall be awarded to small businesses registered in the category of businesses whose gross revenues do not exceed \$1 million; and at least an additional 10 percent shall be awarded to small businesses registered in the category of businesses whose gross revenues do not exceed the applicable annual revenue standards set forth in 13 CFR 121.201.

1. Percentages shall be measured by the total dollar value of all such small business set-aside contracts in comparison to the total dollar value of all publicly advertised contracts awarded by the agency within a fiscal year.

2. The State contracting agencies shall designate specific contracts for each of the two small business set-aside categories.

(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 delegate 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 will be offered as set-aside contracts.

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 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 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 whose gross revenues do not exceed \$1 million, or small businesses whose gross revenues do not exceed the applicable annual revenue standards set forth in 13 CFR 121.201, 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.

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.

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

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-4.2 Subcontracting target program and procedures

(a) When it deems appropriate, any State contracting agency, consistent with its contracting authority, may establish and administer a subcontracting target program in lieu of or as a supplement to the set-aside program.

(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 subcontracting target program shall be made prior to the public advertisement for bids.

(c) The State contracting agency shall set separate subcontracting target levels for the participation of small business subcontractors for each construction contract awarded pursuant to this program. The subcontracting 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 Commerce Commission to determine the number of eligible small businesses in each of the categories set forth in N.J.A.C. 12A:10A-2.1 (17:14-2.1) that may reasonably be expected to participate in the project, giving consider-

ation 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 small 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 small 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 small 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 small business participation in subcontracted elements of the contract but in no event shall exceed 50 percent of the subcontracted elements.

(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 subcontracting 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 small 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 nonresponsive and thus subject to mandatory rejection.

3. The small 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 failing to identify contracts for small businesses with a combined cost estimate meeting the targets shall include documentation of the bidder's good faith efforts to meet the subcontracting targets. Documentation must include a record of the bidder's attempts to contract with eligible businesses and the reasons for failure to meet the subcontracting targets.

(h) 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 small businesses.

(i) The State contracting agency will consider the bidders 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 small businesses.

(j) 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).

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-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 small businesses:

1. The bidder shall attempt to locate qualified potential small business subcontractors;
2. The bidder shall request a listing of small businesses from the Commerce Commission 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).

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

In (a), deleted minority and gender references.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

In (a)2, substituted "Commerce Commission" for "State contracting agency".

12A:10A-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

12A:10A-5.1 Planning

(a) Within 60 calendar days of the finalization of the State budget for each State contracting agency, that agency shall submit to the Secretary a plan for the coming fiscal year to comply with the programs established by these rules. The Commerce Commission 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 set-aside programs; and
3. Identification of those contracts which the State contracting agency intends to include in its nonremedial target programs.

(b) The Commerce Commission shall review the plan to determine whether it is reasonably designed to achieve the State contracting agency's goal of awarding five percent of its total contracting dollars to small businesses registered in the category of businesses whose gross revenues do not exceed \$1 million and an additional 10 percent of its total contracting dollars to small businesses registered in the category of businesses whose gross revenues do not exceed the applicable annual revenue standards set forth in 13 CFR 121.201.

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

In (a)2, substituted "set-aside" for "remedial goal"; -rewrote (b).

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

In (a), substituted "State" for "capital" preceding "budget" and inserted "the coming fiscal year to" following "Secretary a plan for" in the introductory paragraph.

12A:10A-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 Commerce Commission a report containing the following information prescribed by the Commerce Commission:

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 set-aside contracts in each of the two categories of small businesses set forth in N.J.A.C. 12A:10A-4.1;

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. If a registered small 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 subcontracting target programs, setting forth the number and dollar value of subcontracts awarded to each of the two categories of small businesses, respectively; and

3. A description of efforts made by the State contracting agency to conduct outreach and educational programs for potentially eligible small 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 Commerce Commission, in a format prescribed by the Commerce Commission, an analysis of actual contracting dollars paid to all contractors and actual contracting dollars paid to small 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 Commerce Commission.

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

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

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Rewrote the section.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.

12A:10A-5.3 Annual review

The Secretary 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 business programs contained in this chapter. This report shall be based upon the reports submitted to the Commerce Commission 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.

Emergency amendment, R.2003 d.318, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3694(a).

Substituted references to small for gender.

Adopted concurrent amendment, R.2003 d.390, effective September 7, 2003.

See: 35 N.J.R. 1841(a), 3694(a), 4746(a), 4751(a).

Provisions of R.2003 d.318 adopted without change.