

CHAPTER 4

STATE DISADVANTAGED BUSINESS AND STATE WOMAN BUSINESS PARTICIPATION IN DEPARTMENT OF TRANSPORTATION CONSTRUCTION AND PROFESSIONAL SERVICE CONTRACTS USING 100 PERCENT STATE FUNDS

Authority

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

Source and Effective Date

R.2001 d.299, effective July 30, 2001.
See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Chapter Expiration Date

Chapter 4, State Disadvantaged Business and State Woman Business Participation in Department of Transportation Construction and Professional Service Contracts Using 100 Percent State Funds, expires on July 30, 2006.

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

Chapter 4, State Disadvantaged Business and State Woman Business Participation in Department of Transportation Construction and Professional Service Contracts Using 100 Percent State Funds, was readopted as R.2001 d.299, effective July 30, 2001. 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 chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Certification" means the process by which a business that has met the requirements of this chapter is certified as a State disadvantaged business or a State woman business.

"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 professional services contractor providing technical and professional services in support of the planning, 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 professional services, including planning, design, supervision, inspection of transportation projects. In addition, it includes contracts for materials, equipment, and supplies on transportation projects.

"Contractor" means any individual, partnership, limited liability company, firm or any acceptable combination thereof of contracting or offering to contract directly with the Department.

"Decertification" means the process by which a previously certified State disadvantaged business or State woman business is removed from the program.

"Denial of certification" means the disapproval by the Department of an initial application by a business concern for certification as a State disadvantaged business or State woman business.

"Department" means the Department of Transportation of the State of New Jersey.

"Minority" means a person who is:

1. Black, which is a person having origins in any of the black racial groups of Africa;
2. Hispanic, which is a person of Spanish culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race; or
3. Asian American, which is a person having origins in any of the original peoples of the Far East, Southeast Asia, Indian Subcontinent, Hawaii or the Pacific Islands.

"Minority business" means a for profit business that is a sole proprietorship, partnership, limited liability company, or corporation that is owned and controlled by one or more minorities and that meets the eligibility criteria of this chapter.

"Recertification" means the annual process utilized by the Department to ensure that a certified State disadvantaged business or State woman business continues to meet the requirements of the program.

"State disadvantaged business" means a for-profit business that is certified by the Department as being a minority business as defined by this chapter or a business that is owned and controlled by individuals who the Department finds to be socially and economically disadvantaged on a case-by-case basis in accordance with the eligibility criteria at N.J.A.C. 16:4-1.3.

"State woman business" means a for-profit business that is certified by the Department as being a sole proprietorship, partnership, limited liability company, or corporation that is owned and controlled by women and meets all of the eligibility criteria of N.J.A.C. 16:4-1.3.

"Subcontractor" means a party that is engaged by a contractor to perform services in support of a transportation project.

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".

Amended by R.2001 d.299, effective August 20, 2001.

See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

16:4-1.2 Applicability

(a) These rules apply only to Department construction and professional services contracts funded with 100 percent State funds and are not applicable to the award of Department contracts for the purchase of goods and services. The purpose of this chapter is to implement the provisions of N.J.S.A. 27:1B-24, which pertains to contracts with business concerns owned and controlled by socially and economically disadvantaged firms and women.

(b) Applications and questions regarding eligibility as a State disadvantaged business and/or State woman business should be addressed to:

Division of Civil Rights and Affirmative Action
Department of Transportation
1035 Parkway Avenue
PO Box 600
Trenton, NJ 08625-0600

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".

Amended by R.2001 d.299, effective August 20, 2001.

See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

16:4-1.3 Standards of eligibility for State disadvantaged business and State woman business

(a) A business may be eligible for designation as a State disadvantaged business, a State woman business, or both.

(b) In order to be eligible as a State disadvantaged business or a State woman business, a business must satisfy the definition of a State disadvantaged business or a State woman business in N.J.A.C. 16:4-1.1 and the personal net worth of an individual owner of the business shall not exceed \$750,000.

(c) A business shall be deemed to be owned and controlled by minorities, women or socially and economically disadvantaged individuals if:

1. It is at least 51 percent owned by one or more individuals who are minorities, women or individuals who are socially or economically disadvantaged or, in the case of a corporation, 51 percent of the stock is owned by individuals who are minorities, women, or socially and economically disadvantaged; and

2. Its management and daily business operations are controlled by one or more of the individuals who are the minorities, women, or socially and economically disadvantaged individuals who own it.

(d) Individuals who are minorities shall be rebuttably presumed to be socially and economically disadvantaged if their individual personal net worth does not exceed \$750,000. Individuals who are not minorities will be considered socially and economically disadvantaged if they can demonstrate to the Department that they are socially disadvantaged and their personal net worth does not exceed \$750,000.

(e) Individuals who are not minorities shall be deemed to be socially disadvantaged if they have been subject to racial or ethnic prejudice or cultural bias within American society because they are members of a group which has been subject to such prejudice or bias. The prejudice or bias must be based upon their identities as members of the group without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual societal disadvantage must include the following elements:

1. At least one objective distinguishing feature that has contributed to social disadvantage such as race, ethnic origin, gender, disability or other similar features not common to people who are not socially disadvantaged;

2. Personal experiences of substantial and chronic social disadvantage in American society;

3. Employment and business history that demonstrates a lack of entry, success, or advancement in the business world that is not common to individuals who are not socially disadvantaged; and

4. A denial of access to educational or training opportunities that is not common to individuals who are not socially disadvantaged.

(f) In determining personal net worth, the Department shall exclude an individual's ownership interest in the business proposed for certification or recertification, and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excess withdrawals from the business proposed for certification or recertification). A contingent liability shall not reduce an individual's net worth.

(g) The certification by the Department of a business as a Disadvantaged Business Enterprise, pursuant to the requirements of 49 C.F.R. Part 26, establishing the Disadvantaged Business Enterprise Program for Federally funded contracts, qualifies the business for consideration as a State disadvantaged business or State woman business for purposes of this chapter. In order to qualify as a State disadvantaged or State woman business, the business shall specifically meet the eligibility criteria of this section and the definitions of the terms "State disadvantaged business" or "State woman business," as applicable, articulated in N.J.A.C. 16:4-1.1.

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.

Amended by R.2001 d.299, effective August 20, 2001.
See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

16:4-1.4 Certification procedures for State disadvantaged business and State woman business

(a) A business may apply to the Department at any time to be certified as a State disadvantaged business or State woman business. Such application must be made on the application form supplied by the Department. All firms wishing to participate in the Department's target program must be certified in accordance with this chapter.

(b) If a business is to be counted as a State disadvantaged business or a State woman 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 by the Department, the complete certification application must be received by the Division of Civil Rights and Affirmative Action in accordance with the following schedule:

1. A business that wants to be counted as a State disadvantaged business or State woman business, for the purpose of meeting the target levels for a specific contract at the time of the award of that contract, shall submit its completed application at least 15 calendar days prior to the date for the receipt of bids for that contract.

2. A business that wants to be considered as a State disadvantaged or State woman business for the purpose of meeting target levels for a specific contract, either as an additional or replacement subcontractor, after work on the contract has commenced, shall submit its completed application at least 15 calendar days prior to submitting a request for Approval to Sublet (Form DC-18) to the Department.

3. Failure by an uncertified business to submit a completed application for certification for a specific contract in accordance with this subsection shall result in the applicant not being considered for certification for that contract.

(c) All applications must be completed in their entirety before they will be considered by the Department. If an applicant knowingly supplies false or inaccurate information, the applicant shall be disqualified, and may be subject to further penalties as provided by law.

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.

Amended by R.2001 d.299, effective August 20, 2001.

See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

16:4-1.5 Approval or denial of certification, or decertification, as a State disadvantaged business or State woman business

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

(b) When an applicant is rejected as a State disadvantaged business or State woman business, it shall be notified in writing of the reasons for that decision. The applicant may request an informal hearing by writing to the Department within 20 State business days of the receipt of said denial notice. The burden of proof of eligibility shall be upon the applicant in any such proceeding. The applicant is not prohibited from contracting with the Department during the pendency of its appeal; however, not as a State disadvantaged or State woman business pursuant to this chapter.

1. If an applicant requests an informal hearing on the denial of its application for certification, the Department shall schedule a meeting at which the applicant may present additional information in support of its application. The Commissioner, or his or her designee, shall review this additional information and the applicant shall be advised of the Commissioner's decision within 30 State business days of the hearing.

(c) When the Department determines to decertify a State disadvantaged or State woman business for failure to meet the requirements of this chapter, the business shall be notified in writing of the reasons for that decision. The business may request an informal hearing by writing to the Department within 20 State business days of the receipt of said notice of intent to decertify. The business will be notified of the Department's decision within 30 State business days of the hearing. The business shall be eligible to participate as a State disadvantaged business and State woman business in the target program during the pendency of its appeal to the Department.

(d) If, at any time, the Department has reason to believe that there has been a change in the ownership or control of a State disadvantaged or State woman business that has been certified for participation in the program, the Department may request that business to demonstrate its continued eligibility for participation in the program. Businesses failing to demonstrate such continued eligibility to the satisfaction of the Department shall have their certifications 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.

Amended by R.2001 d.299, effective August 20, 2001.
See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

16:4-1.6 Subcontracting targets

(a) The Department shall set target levels for participation of State disadvantaged and State woman 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 that fails to meet the target levels for State disadvantaged and State woman 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 State disadvantaged and State woman businesses of subcontracting opportunities under a given solicitation;

2. Solicitations of State disadvantaged and State woman businesses as subcontractors for the project, including advertisements in general circulation media, trade association publications, and minority and disadvantaged-focused media. Such solicitation shall be made at a sufficient length of time before the date set for receipt of bids to permit a meaningful response from State disadvantaged and State woman businesses. Contractors shall maintain records regarding each State disadvantaged or State woman 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 State disadvantaged or State woman businesses; and

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 State disadvantaged and State woman 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 subcontract to a business owned by a black woman may be counted toward either the State disadvantaged business target or the State woman 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.

Amended by R.2001 d.299, effective August 20, 2001.
See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

In (e)2, substituted "and disadvantaged-focused" for "focus"; in (f), substituted "subcontract" for "subcontractor"; substituted "State disadvantaged" for "minority" and "State woman" for "female" throughout.

16:4-1.7 Counting State disadvantaged or State woman business participation

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

(b) The contractor shall count toward the contract only those expenditures to a certified State disadvantaged or State woman businesses that perform a commercially useful function. A commercially useful function is performed when the certified State disadvantaged or State woman 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 to the contractor for work performed by non-State disadvantaged or State woman 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.

Amended by R.2001 d.299, effective August 20, 2001.

See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

Rewrote the section.

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 State disadvantaged or State woman business that it intends to use to meet the target.

(b) If a State disadvantaged or State woman business that was to be used by the contractor to meet the target does not perform the work, the contractor shall attempt to replace that State disadvantaged or State woman business with another State woman or State disadvantaged business provided the contractor first obtains the written consent of the Division of Civil Rights and Affirmative Action to ensure adherence to this chapter. The contractor shall submit in writing to the Division of Civil Rights and Affirmative Action the request to replace the original State disadvantaged or State woman business. Work in the category concerned shall not begin until such approval is granted. If the contractor fails to replace the business with a State woman or State disadvantaged 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.

Amended by R.2001 d.299, effective August 20, 2001.

See: 33 N.J.R. 1188(a), 33 N.J.R. 2819(b).

In (a), substituted "that" for "which"; in (b), substituted "Civil Rights and" for "Civil Rights"; substituted "State disadvantaged" for "minority" and "State woman" for "female" throughout.

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).