

## SUBCHAPTER 3. REGISTRATION

**12A:10-3.1 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 any applicable fees. 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 revenues. 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. 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).

5. 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 vendor lists.

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

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

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

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

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

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

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

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Rewrote the section.

**12A:10-3.2 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 the 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.

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

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

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Rewrote (b).

**12A:10-3.3 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 business's eligibility shall not stay the contract award process.

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

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

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Substituted "Commission" for "Department" throughout.

## SUBCHAPTER 4. SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAM

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

(a) Each State contracting agency, consistent with its contracting authority, shall establish and administer a set-aside program which provides for at least 15, or the established goal pursuant to the Set-Aside Act, N.J.S.A. 52:32-17 et seq., whichever is greater, 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 whose gross revenues do not exceed \$500,000; at least an additional five percent shall be awarded to small businesses whose gross revenues do not exceed \$5 million; and at least an additional five percent shall be awarded to small businesses whose gross revenues do not exceed \$12 million.

1. Percentages 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.

2. The State contracting agencies shall designate specific contracts for each of the three 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, including contracts executed under its bidding threshold, as established by N.J.S.A. 52:34-7 et seq. The set-aside procedures shall include the following provisions:

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

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

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

(c) When a State contracting agency has made a determination that a contract 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 \$500,000 or small businesses whose gross revenues do not exceed \$5 million or small businesses whose gross revenues do not exceed \$12 million, 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.

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

5. 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.224, effective May 1, 1995.

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

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Rewrote (a) and (c) and deleted (d).

Administrative correction.

See: 35 N.J.R. 3862(a).

### 12A:10-4.2 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 and subcontracting opportunities on the project.

ii. The designation of a particular contract as part of the subcontracting target program shall be made prior to the public advertisement for bids or established pursuant to addenda.

(c) 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.

(d) 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 may render the proposal non-responsive and thus subject to 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.

(e) A bidder's proposal failing to identify contracts for small businesses shall include documentation of the bidder's good faith efforts to meet the subcontracting targets. Documentation may include a record of the bidder's attempts to contract with eligible businesses and the reasons for failure to meet the subcontracting targets, or a certification that the bidder does not intend to subcontract any work.

(f) 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.

(g) 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.

(h) 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.

Emergency New Rule, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).  
Sec: 35 N.J.R. 3689(a).

Former N.J.A.C. 12A:10-4.2, Good faith efforts of bidders; requirements, recodified to N.J.A.C. 12A:10-4.3.

#### 12A:10-4.3 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, as established in the RFP:

1. The bidder shall attempt to locate qualified potential small business subcontractors;

2. The bidder shall request a listing of small businesses from the State contracting agency if none are known to the bidder;

3. The bidder shall keep a record of its efforts, including the names of businesses contacted and the means and results of such contacts;

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

5. The bidder shall attempt, wherever possible, to negotiate prices with potential subcontractors submitting higher than acceptable price quotes.

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

Emergency recodification from N.J.A.C. 12A:10-4.2 and amendment by R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).  
Sec: 35 N.J.R. 3689(a).

In (a), deleted gender and minority references. Former N.J.A.C. 12A:10-4.3, Good faith efforts of bidders; requirements, recodified to N.J.A.C. 12A:10-4.4.

#### 12A:10-4.4 Exemptions from set-aside program

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

Emergency recodification from N.J.A.C. 12A:10-4.3, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).  
Sec: 35 N.J.R. 3689(a).

### SUBCHAPTER 5. PLANNING, REPORTING AND REVIEW

#### 12A:10-5.1 Planning

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

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

- i. The name of the products or services covered by the contract;
- ii. The expiration date of the current contract and the estimated date of the public bid;
- iii. The term or duration of the contract;
- iv. The estimated dollar value of the contract or the amount expended to date on the current contract;
- v. The contracts that the agency intends to set aside in each of the three small business set-aside categories set forth in N.J.A.C. 12A:10-4.1 (17:13-4.1);
- vi. The contracts which have been identified as appropriate for its set-aside programs and the contracts which have been identified as appropriate for its target programs;
- vii. In addition to the requirements in (a)1i through vi above, the Division of Purchase and Property shall identify those multi-source term contracts included in the Cooperative Purchasing Program and indicate which of the multi-source contracts will be set-aside in their entirety and which will contain select line items set aside for small businesses.

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

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

3. Each State contracting agency shall list contracts awarded as the result of Waivers of Advertising.

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

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

(b) The 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 whose gross revenues do not exceed \$500,000, an additional five percent of its total contracting dollars to small businesses whose gross revenues do not exceed \$5 million, and an additional five percent of its total contracting dollars to small businesses whose gross revenues do not exceed \$12 million.

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Substituted references to small business programs for set-aside; in (a), rewrote 1v through vii and 3; rewrote (b).

#### 12A:10-5.2 Reporting requirements

(a) Within 30 calendar days of the end of each State contracting agency's fiscal quarters, the agency shall file with the 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, a list of the bidders awarded contracts including the amount of the contract award, delineating which of these contracts and the percentages that were advertised and awarded as set-aside contracts in each of the three categories of small businesses set forth in N.J.A.C. 12A:10-4.1 (17:13-4.1);

- i. The State contracting agencies, in determining compliance with the set-aside goals for the three categories, shall count only those contracts awarded as a result of set-aside designations and only for the categories designated. If a registered small business is awarded a contract that was not set aside, that contract cannot be counted as a set-aside award but shall be counted toward attainment of the agency's overall goal.

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

2. The total number and dollar value of all advertised and awarded contracts which included subcontract targets, setting forth the number and dollar value of subcontracts awarded to each of the three categories of small businesses, respectively.

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

4. A description of efforts made by the State contracting agency to conduct outreach and educational programs for potential 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 each of the three categories of 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.224, effective May 1, 1995.

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

Emergency amendment, R.2003 d.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).

Substituted references to each of the three categories for minority business and female business throughout; in (a), rewrote 1 and 2.

#### **12A:10-5.3 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.317, effective July 9, 2003 (to expire September 7, 2003).

See: 35 N.J.R. 3689(a).