

VOLUME V
STATE PURCHASING:
HISTORICAL RECORD OF MINORITY
AND WOMEN-OWNED BUSINESS
ENTERPRISES
IN
PUBLIC AND PRIVATE CONTRACTING IN
NEW JERSEY

A Report Submitted to
NJ TRANSIT
and the
Governor's Study Commission on Discrimination in
Public Works Procurement and Construction Contracts

by
The Afro-American Studies Program
University of Maryland at College Park

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STATE PURCHASING

I. PUBLIC CONTRACTING PROGRAMS

The New Jersey Legislature has created three general public contracting programs addressing the ability of government entities to enter into contracts for the provision of goods and services.

At the State level, the Treasury Department is organized into the Division of Purchase and Property as well as the Division of Building and Construction. The Division of Purchase and Property ("DPP") has primary responsibility for State purchasing of goods and services.¹ The Division of Building and Construction ("DBC") is responsible for purchasing of construction related goods and services.² The State scheme mandates that the award shall be made to "that responsible bidder whose bid,

¹ The Purchase Bureau has exclusive authority to purchase all articles for the state and its using agencies. N.J.S.A. 52:25-6. In addition, the Purchase Bureau may also make purchases on behalf of any county, municipality or school district. N.J.S.A. 52:25-16.2. Finally, it is empowered to delegate purchasing authority to individuals using agencies for purchases not in excess of a specified dollar amount. N.J.S.A. 52:25-23. However such using agencies are prohibited from bifurcating purchases and contracts in an attempt to circumvent the dollar limit. N.J.S.A. 52:25-23a.

² DBC has the authority to award contracts relating to the erection, construction, alteration or repair of any public building or facility. N.J.S.A. 52:34-7. Such a contract includes both labor and materials and is required to go out for bid if the amount involved exceeds the statutory threshold. It may, however, delegate the purchasing authority to the appropriate State department or using agency to make, negotiate, or award contracts or agreements without advertising for purchases not in excess of a specified dollar amount. N.J.S.A. 52:34-7.

conforming to the invitation for bids, will be most advantageous to the [awarding agency]."³

The second purchasing category applies to state authorities. State authorities are required to award contracts to the "lowest responsible bidder."⁴ The third category is that which is applicable to municipalities as set forth in the Local Public Contracts Law.⁵ This statute mandates that all purchases, contracts or agreements which require public advertisements for bids be awarded to the lowest responsible bidders.

The statutes identified above are by no means a comprehensive listing of all bidding statutes. There are several statutes which do not fall into any of the three broad categories. These include, among others, the Transportation Act which grants to the Department of Transportation ("DOT") "the means whereby the full resources of the state can be used or assist in the solution of the problems of all modes of

³ N.J.S.A. 52:32-12. In addition, this same scheme is utilized by two state authorities—the Hackensack Meadowlands Development Commission and the Sport Authority. See N.J.S.A. 13:17-6.1.; and N.J.S.A. 5:10-21.1. In applying the statutory standard, the New Jersey Supreme Court has held that the public agency may reject any bid if it determines that the "public interest" so dictates. Keyes Martin & Co. v. Director, Div. of Purchase, 99 N.J. 244 (1985). See, also, In re Honeywell Information Systems, Inc., 145 N.J. Super. 53 (1977). As a result, DPP may exercise its discretion and by-pass a low bidder. DPP may bypass a low bidder in the event it determines that the bidder is either not a responsible bidder or if the public's interest would not be served in awarding the contract to the lowest bidder.

⁴ Examples of authorities to which this second scheme applies include the New Jersey Highway Authority, N.J.S.A. 27:12B-5.2; the New Jersey Expressway Authority, N.J.S.A. 27:12C-11.1; and the New Jersey Turnpike Authority, N.J.S.A. 27:23-6.1. The authority may, however, reject any bid if it determines that it is for public convenience.

⁵ N.J.S.A. 40A:11-1 et seq.

transportation for the State...."⁶ The DOT is responsible for numerous public contract programs.⁷ The Public School Contracts Law imposes requirements on purchasing procedures utilized by local boards of education similar to those imposed by the Local Public Contracts Law discussed above.⁸ Similarly, the State College Contracts Law governs public bidding for State College contracts.⁹

While there are many statutes which impose requirements on various state agencies, the focus of this paper is limited to the development of State procurement practices with respect to women and minority business enterprises.

II. STATE PROCUREMENT PROCEDURES

The purchasing power of State agencies has grown immensely over the past decade. In fiscal year 1988, the Division of Purchase and Property, Purchase Bureau

⁶ N.J.S.A. 27:1A-1 et seq.

⁷ The DOT has promulgated its own regulations found at N.J.A.C. 16:1-1 et seq. Several of the programs contained in these regulations require public bidding. See, e.g., State Aid to Counties and Municipalities, N.J.A.C. 16:21; New Jersey Bridge Rehabilitation and Improvement Fund, N.J.A.C. 16:21A, 16:21B; Urban Revitalization, Special Demonstration and Emergency Project, N.J.A.C. 16:22.

⁸ N.J.S.A. 18A:1-1 et seq.

⁹ N.J.S.A. 18A:64-52 et seq. Contracts are required to be awarded to the lowest responsible bidder. Construction contracts are governed by N.J.S.A. 18A:74-74 et seq. Community Colleges and the College of Medicine and Dentistry is also authorized to award contracts. The requirements for community colleges are similar to those which govern State Colleges. N.J.S.A. 18A:64A-25.3 et seq. Likewise, the Medical and Dental Education Act requires that board of trustees for the University of Medicine and Dentistry to publicly bid when the amount involved exceeds a specific amount. The award is to be made to the bidder whose bid is most advantageous to the University, price and other factors considered. N.J.S.A. 18A:64G-6.

awarded approximately \$930 million in total purchases for State agencies.¹⁰ It is the goal of the Purchase Bureau to ensure that New Jersey taxpayers receive maximum value for each State purchase dollar. Toward that goal, the New Jersey Legislature has enacted extensive legislation intended to encourage qualified vendors to participate in State bidding opportunities, provide competitive pricing, deliver quality goods and services in prescribed time frames and prevent nepotism and favoritism in the bidding process.

In 1930, the New Jersey Legislature enacted L. 1930 c. 70 requiring public advertising for bids on any contract or agreement for the construction of any building, for making alterations, extensions or repairs thereto, for the doing of any work or labor, or for the furnishing of any goods, chattels supplies or materials of any kind, the cost or contract price whereof was to be paid out of state funds and exceeding one thousand dollars. In 1954, the New Jersey Legislature repealed the 1930 Act and enacted the current bidding statute.¹¹ The 1954 statute requires public

¹⁰ 21 N.J.R. 2810 (September 5, 1989).

¹¹ The statute was subsequently amended in 1979 and 1985. These amendments essentially increased the threshold amount below which public advertisement for bids was not necessary. The 1979 amendment rewrote N.J.S.A. 52:34-7(a) which formerly read:

Any such purchase, contract or agreement may be made, negotiated, or awarded by the Director of the Division of Purchase and Property without advertising if the aggregate amount involved does not exceed \$2,500.00 in any manner which he may deem effective to promote full and free competition whenever competition is practicable.

See, L.1979, c. 422, section 1 Eff. February 8, 1990. The 1985 amendments substituted "\$7,500.00" for "\$2,500.00" for the threshold amount for purchase contracts and deleted a provision which made a limit of \$7,500 applicable in the case of the purchase of construction materials and supplies not available from contractors vendors and were necessary in the erection, construction, alteration or repair of state buildings and facilities.

advertising for bids on any contract or agreement the cost or contract price whereof is paid with or out of State funds.¹²

The requirement for public advertisement for bids does contain numerous exceptions. Contracts which are below specified amounts may be negotiated or awarded without advertisement.¹³ Furthermore, any purchase, contract or agreement which exceeds the threshold amount may be negotiated or awarded when the subject matter is:

- (1) services of a technical or professional nature;
- (2) the purchase of perishable foods or subsistence supplies; or
- (3) the lease of office space, office machinery, specialized equipment, buildings or real property as required to conduct the State's business.¹⁴

Additional exceptions to public advertisement are available for contracts which exceed the threshold amount when:

- (1) a public exigency requires;

See, L.1985, c. 107 section, 2 eff. April 9, 1985. In addition, the statute was amended to insert "including labor and construction materials" within the aggregate amount used to determine whether the threshold amount for building and construction contracts has been exceeded; substituted "\$25,000.00" for "\$10,000.00" for the threshold amount used for building and construction contracts, and added a paragraph which requires the Governor to adjust the threshold amount each odd numbered year. See, L.1985, c. 349 section 1, eff. 1985.

¹² N.J.S.A. 52:34-6.

¹³ N.J.S.A. 52:34-8. The current bidding statute provides that the threshold amount provided for in the statute, i.e. \$7,500 for the Purchase Bureau and \$25,000 for the Division of Building and Construction, shall be adjusted no later than March 1 of each odd numbered year based upon the consumer price index. N.J.S.A. 52:34-8b.

¹⁴ N.J.S.A. 52:34-9.

- (2) only one (1) source of supply is available;
- (3) more favorable terms can be obtained from a primary source of supply;
- (4) articles of wearing apparel are to be purchased which are styled or seasonal in character;
- (5) commodities traded on a national market are to be purchased and fluctuations of the market require immediate action; or
- (6) the public interest requires technical equipment which is standardized and which allows for interchangeability be purchased.¹⁵

The bidding statute provides numerous exceptions to public bid advertisements.

These exceptions to advertisement are not, however, mandatory. Rather, the Director of the Division of Purchase and Property or the Director of the Division of Building and Construction is granted the discretion to award contracts without advertisement with the written approval of the State Treasurer.¹⁶ Therefore, while the bidding statute is intended to encourage vendor participation in the bidding process, the exceptions provide the Director with the authority to bypass the public bidding process in certain situations. Any programs designed to promote access to the bidding process for women and minority business entities would not reach or impact contracts which are awarded outside the bidding process.

III. DEVELOPMENT OF NEW JERSEY'S SET ASIDE PROGRAM

¹⁵ N.J.S.A. 52:34-10.

¹⁶ N.J.S.A. 52:34-8; N.J.S.A. 52:34-9; N.J.S.A. 52:34-10.

Discrimination against women and minorities in New Jersey has a long history. Slavery existed in New Jersey until the beginning of the Civil War and was not made illegal until the adoption of the Thirteenth Amendment to the U.S. Constitution.¹⁷ It was not until 1921 that disabilities were removed with respect to office holding or employment by this State by women.¹⁸

In 1933, the New Jersey enacted legislation with the expressed purpose of prohibiting discrimination in public works employment. The statute provided:

Every contract for or on behalf of the State or any county or municipality for the construction, alteration or repair of any public building or public work shall contain provisions by which the contractor agrees that:

a. In the hiring of laborers, workmen and mechanics for the performance of work under this contract or any subcontract hereunder, no contractor, nor any person acting on behalf of such contractor or subcontractor, shall, by reason of race creed or color discriminate against any citizen of the State of New Jersey who is qualified and available to perform the work to which the employment relates;

b. No contractor, subcontractor, nor any person on his behalf shall in any manner, discriminate against or intimidate any employee hired for the performance of work under this contract on account of race, creed, or color;

c. There may be deducted from the amount payable to the contractor by the State of New Jersey or by any municipal corporation thereof, under this contract, a penalty of five dollars (\$5.00) for each

¹⁷ In 1884, the first Civil Rights Bill was passed in New Jersey. See, L.1884 c. 219. In light of the extensive civil rights and anti-discrimination legislation enacted in the 1940's it is impossible to assess what, if any, impact the 1884 Civil Rights Bill actually had.

¹⁸ L.1921 c. 299 section 1 currently codified as N.J.S.A. 10:1-1. In 1941, the Legislature amended N.J.S.A. 10:1-1, to prohibit discrimination based on marital status. Thus, in Ahrensfeld v. State Board of Education, 126 N.J.L. 543 (1941) the New Jersey Supreme Court stated in dicta that a resolution by a board of education opposing the placement of married female teachers under tenure of office violated constitutional limits.

person for each calendar day during which such person is discriminated against or intimidated in violation of the provision of the contract; and

d. This contract may be canceled or terminated by the State of New Jersey or by any county or municipality thereof; and all money due or to become due hereunder may be forfeited, for a second or any subsequent violations of the terms or conditions of this section of the contract.¹⁹

The statute prohibited a contractor from discriminating in the employment on public works projects on the basis of race, creed or color.²⁰ No concern was expressed as to whether a minority contractor himself might be discriminated against and therefore unable to compete in the bidding process as a vendor or contractor. Indeed, the statute did not prohibit discrimination in the acquisition of materials, equipment supplies or services--this prohibition was not enacted into law until 1962.²¹ Thus, a vendor could not employ discriminatory hiring practices. However the legislation did not encourage or promote the awarding of contracts to minority contractors. Instead the legislation on its face did little more than maintain the status quo with regard to contract awards.

The 1945 Civil Rights Act expressly forbade discrimination in employment because of race, creed, color, or ancestry.²² In addition, Chapters 168 to 174 of

¹⁹ See, L.1933 c. 277, Section 1.

²⁰ The statute was amended in 1945. The 1945 amendment extended the prohibition against discrimination in employment on public works to include discrimination due to "national origin or ancestry." L. 1945, c. 171 section 1.

²¹ N.J.S.A. 10:2-1 was amended in 1962. The 1962 amendment rewrote the section to read as it now appears except for the words "marital status or sex" added in 1970.

²² L. 1945 c. 169. N.J.S.A. 10:5-6.

1945 created the Division Against Discrimination and broadened all Civil Rights Laws to include "creed, national origin, or ancestry."²³

For women, the granting of civil rights protection was not created until much later. The 1933 statute contained no prohibition for discrimination against the employment of women in public works projects. This protection was not granted to women until 1970.²⁴ The 1945 Civil Rights Act was amended in 1970 to prohibit discrimination based upon age, marital status and sex.²⁵

²³ See, N.J.S.A. 10:5-1 et seq.

²⁴ See, L.1970, c. 80 section 7, eff. June 2, 1970 (codified at N.J.S.A. 10:2-1). The 1970 amendment to N.J.S.A. 10:2-1 also prohibited employment discrimination on public works contracts based upon marital status.

²⁵ L.1970, c. 80, (codified at N.J.S.A.) 10:5-6.

In 1947, the State of New Jersey held a Constitutional Convention. At that time, the Convention re-examined the provisions of New Jersey's 1844 Constitution in light of the ensuing century to recast and revise "that Constitution so that it more closely corresponds to the needs of today."²⁶ The practice of discrimination on the basis of race, color or national origin was discussed at length. The Joint Committee on Constitutional Bill of Rights stated:

A century later, impairment of the basic truth of equality manifested itself in the undemocratic practice of many employers to refuse employment to person of certain racial or religious groups. Recognizing that the truth of equality is as valid today as in 1844, our Legislature enacted the law against discrimination (chapter 169 of the Laws of 1945) even though no provision of the 1844 Constitution expressly authorized such legislation. Today the principal threats to the truth of equality are found in practices of discriminations because of race, color, religion, or national origin in the fields of employment, education, enjoyment of property and pursuit of a livelihood in a business, trade or profession. The purpose of the proposed amendments to the 1844 Constitution which we respectfully submit for the consideration of this Convention is to recognize and declare that the basic truth of equality is a valid in these areas as in the political area.²⁷

²⁶ State of New Jersey Constitutional Convention of 1947, Committee on Rights and Privileges, Memorandum of Joint Committee on Constitutional Bill of Rights, vol. 111 at 344.

²⁷ Id. at 344-45. (emphasis added). It is interesting to note that at this point in time, the United States had already made representations to foreign governments with respect its treatment of minority nationals. Treaties concluding both world wars contained provisions requiring the signatories not to discriminate against their national and racial minorities. The Charter of the United Nations, ratified by the Senate of the United States and signed by the President in August, 1945, imposes upon all signatories the duty to "promote...uniform respect for the observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religions." (Article 55c). Despite validity of the principle recognized by the Federal government in the international arena, Convention acknowledged that at least with regard to the fields of employment, education, and pursuit of a livelihood in a business, trade or profession, equality had not manifested itself.

The Convention also expressly recognized that in the 20th Century, equality of opportunity in employment cannot exist without a co-equality of opportunity in education. The Joint Committee on Constitutional Bill of Rights stated:

Our complex economy demands educational training for its responsible positions. It is unrealistic and ineffectual, if not hypocritical, to guarantee to person of all races and religions the right to practice medicine, or engineering or law without guaranteeing them the right to be free from racial or religious discrimination in obtaining admission to medical or engineering or law schools so as to acquire the training which would enable them to practice those professions.²⁸

A review of the debate held concerning a civil rights amendment to the New Jersey Constitution demonstrates that the concern in 1947 was not with government contracting policies. Rather the concern was with improving the educational opportunities and general living conditions of minorities within the State. Thus, the resolution of the Urban Colored Population Commission states that:

the legislated authority and the intense interest of the Urban Colored Population Commission since 1938 have been the improvement of the economic, cultural, health and general living conditions of New Jersey's Negro population with an ultimate goal of securing for the Negro population full, integrated participation and enjoyment of all the rights, privileges, and benefits of democratic citizenship without discrimination, solely because of race, creed or color in order to secure to the urban colored population, equal opportunity with the general population thereof for self support and the economic and cultural development to the extent, if any, that such opportunity does not now exist....²⁹

The demand for better education and economic conditions lends support for the position that a lack of education and poor economic conditions in essence prohibited minorities from establishing businesses due to a lack of necessary education,

²⁸ Id. at 350.

²⁹ State of New Jersey Constitutional Convention of 1947, vol. III at 455.

experience and capital. Thus, the demand was for better conditions; the necessary building blocks upon which the foundation of a sound economic enterprise could be built and not on better opportunities for a completed structure.

Similarly, the convention noted that discrimination against women existed. The New Jersey Federation of Women's Clubs in a letter to the convention stated: "[w]e realize that discrimination does, at present, exist against women on account of sex...."³⁰ The New Jersey State Bar Association Committee on the Status of Women ("NJSBACSW") also acknowledged the presence of sex discrimination. The Committee stated:

The present Constitution still keeps women in a subject class, although by peaceful revolution women have gained a legal status almost equal to that of men and the disabilities of the common law have reached also the vanishing point. The main difference which now exists between the rights of men and women is that the rights of men are established by the Constitution, while the legal status of women has been gained by legislation and the assumption of right and the right to vote. There is no way by which women can achieve equal status as citizens and be brought out of this subject class, except by constitutional provision.

* * *

Women now own more than half of the wealth of the country and are assuming great public responsibilities as legislators, jurors, administrative officers and even holding minor judicial positions. Through these efforts the property rights of men and women have become interwoven in our great political and social system. An impairment of the rights of women would affect our whole economy and becomes a possibility which should be guarded against since they are subject to alteration and repeal at the will of the Legislature.³¹

³⁰ Id. at 404. The federation went on to state that it believed that redress should be had through legislation rather than through a constitutional provision.

³¹ Id. at 412-13.

Despite the statements by NJSBACSW concerning the advancements made be women and the suggestion that equality between men and women had almost been achieved, the Committee noted that:

Women are serving on juries under legislative enactment but the courts have not passed upon the validity of it, the only reference to it in court decisions is in dicta.³²

The end result of the Constitutional Convention was a provision in New Jersey's Constitution which prohibited the denial of rights; discrimination; and segregation based on race. Article 1 Paragraph 5 of the 1947 Constitution provides:

5. Denial of rights; discrimination; segregation

5. No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.

In the late 60's and early 70's, the State Government was racked with scandals involving the misdeeds of government officials in connection with public contracts. Two successive Secretaries of State and two successive State Treasurers were indicted (it should be noted that the scandals were bipartisan in nature, involving both Democratic and Republican office holders.) Governor Brendan Byrne was elected in 1973 on a platform of "reform."

In January, 1974, Brendan T. Byrne was sworn in as Governor of New Jersey. In his inaugural address, Governor Byrne promised equal rights for all and special

³² Id.

privileges for none. Three years later in his annual address, Governor Byrne reported on the progress made in restoring integrity to state government and stated:

When we came into office we inherited a state government that lacked fundamental integrity. The public believed the awarding of contracts could be influenced for the price of a contribution to the right political party at the right time.

* * *

This administration is conducting the state's business professionally, not politically. The state's revenue raising and spending practices are conducted openly for all to see.

*An Architect/Engineer Selection Board screens applicants to guarantee the award of design contracts solely on the basis of merit and cost, not political favoritism. Saving to date, \$450,000

*Professional contracts, for accounting, auditing, stenographic and similar services, are awarded by competitive bid rather than by waiver, as was common practice in the past. Saving to date, \$715,000.

*We eliminated favoritism in the selection of leased office space, serving unnecessary broker's fees, and are experimenting with bidding of leased space.

*We saved \$1.5 million in insurance costs by eliminating brokers' services and restructuring policies on a business like basis.

*We award state time-deposit accounts by bid to the bank which offers the highest interest rate. Additional earnings to date, \$200,000. Previously these deposits were placed in financial institutions chosen by the Treasurer.³³

In light of the Governor's remarks, it can only be concluded that despite the existence of bidding laws for decades, favoritism still influenced the awarding of contracts. Moreover, the bidding laws while appearing to create a system to ensure

³³ See, Annual Message of Governor Brendan T. Byrne dated January 11, 1977.

against corruption may have actually benefitted established interests by unknowingly providing the appearance of legitimacy.

It was during the Byrne Administration that the most recent reform to bidding laws occurred. These reforms were aimed at prohibiting discrimination and eliminating favoritism. In 1975, the Law Against Discrimination was amended so that State, County, municipality, other political subdivisions of the State or any agency or authority created by any of the foregoing must include in bid specifications affirmative action contract provisions.³⁴ In addition, each prospective bidder on a public works contract or contracts and each subcontract bidder to a prime contract bidder is required to submit an affirmative action plan to the State Treasurer for his approval.³⁵ The failure to adhere to these requirement results in the contract being declared null and void.³⁶

By far the most far reaching attempt to assist women and minority business entities to participate in the State procurement process was the Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses which was enacted in 1985.³⁷ The Set-Aside Act provided that State contracting agencies³⁸ have as a goal

³⁴ N.J.S.A. 10:5-33.

³⁵ N.J.S.A. 10:5-34.

³⁶ N.J.S.A. 10:5-35.

³⁷ N.J.S.A. 52:32-17 et seq.

³⁸ Such agencies include all of the Departments in the Executive branch, the state colleges, as well as the several authorities and commissions. N.J.A.C. 12A:10-1.1(c) and N.J.A.C. 17:12-6.1(e).

the awarding of at least 15% of their contracts for goods, equipment, constructions and services to small businesses, at least 7% to minority businesses and at least 3% to female the businesses. The Act permitted contracting agencies to set aside contracts or portions thereof for bidding only by small businesses, minority businesses, and female businesses where there is a reasonable expectation that bids may be obtained from three such qualified businesses.³⁹ A contract designated as a set aside contract may be rebid if acceptance of the lowest responsible bid of such contract will result in the payment of an unreasonable price or in a contract otherwise contrary to the governing statutes and regulations or the agency does not receive bids for three qualified bidders.⁴⁰

In enacting the set-aside act the Legislature declared:

that the existence of a strong and healthy free enterprise system is directly related to the well being and competitive strength of small business, female business, and minority business concerns and to the opportunity for small business, female business, and minority business to have free entry into business and to expand; and finds that the State must ensure that a fair portion of the State's total purchases and contracts for construction property and services is placed with small business, female business and minority business concerns.⁴¹

As a result of the Croson decision, the Attorney General advised that those provisions of N.J.S.A. 52:32-21 et seq. and N.J.A.C. 17:12-6 establishing set asides based on race at that time lack the necessary evidentiary predicate establishing a compelling State interest in eradicating prior discrimination, and are not a sufficiently

³⁹ N.J.S.A. 52:32-20 and 52:32-21.

⁴⁰ N.J.S.A. 52:32-26; N.J.A.C. 12A:10-1.13(c).

⁴¹ N.J.S.A. 52:32-18.

narrowly tailored remedy for actual identified discrimination.⁴² Likewise, the Attorney General determined that the gender-based set aside established by N.J.S.A. 52:21 et seq. and N.J.A.C. 17:12-6 were similarly invalid.

Based on the Attorney General's opinion, the Department of Treasury proposed and adopted amendments at N.J.A.C. 17:13 to establish set aside contracts based on race-and gender-neutral categories. The amendments deleted the minority and female business categories of set asides, and established two new categories of businesses--urban development enterprises and micro businesses.⁴³ The rules establish a seven percent goal for urban development enterprises and a three percent goal for micro businesses.

Urban development enterprises are defined as independently owned and operated businesses having no more than 50 full-time employees whose principal place of business is located in a municipality qualified under the Urban Development Corporation Act. A micro business is defined as an independently owned and operated business having no more than 20 full time employees.

With respect to the rules applicable to construction contractors, a different approach was taken. The rules found at N.J.A.C. 17:14 establish a procedure to guarantee that State construction contractors engage in market outreach efforts and do not presently discriminate against minority and female businesses in awarding construction subcontracts. These regulations do not seek to remedy past

⁴² 21 N.J.R. 2811.

⁴³ 21 N.J.R. 2810-2821 (September 5, 1989).

discrimination; nor do they assume that any contractor has engaged in unlawful discrimination. The proposed rules establish that the criteria for determining the responsibility of a bidder include nondiscrimination in the selection of subcontractors and engaging in market outreach efforts.

Under the State Construction Contract regulations, each construction contract is reviewed and target levels set for female and minority subcontractor utilization for the particular contract. In addition, reasonable market outreach efforts are identified for the contract. The subcontractor target levels do not serve as goals but rather as a screening device to further scrutiny. Bidders who achieve the subcontractor target participation levels are not subject to further review of their subcontracting practices. The subcontractor practices of bidders failing to meet target levels are reviewed to determine whether minority and/or female-owned firms were treated in a nondiscriminatory manner. If the review reveals discriminatory subcontracting practices by the bidder or if the bidder fails to engage in reasonable market outreach efforts, the bidder will be disqualified from bidding on the particular contract.⁴⁴ The rules also describe eligibility standard for minority and female construction contractors as well as registration and approval procedures for such contractors.

The construction contract program is essentially a program aimed at eliminating present discrimination by prime contractors in awarding of subcontracts on State construction projects. It is not designed to remedy prior discrimination and does not require a fixed number of subcontracts be awarded to female and minority businesses.

⁴⁴ N.J.A.C. 17:14-1.1. et seq.

Further, it is not designed address the awarding of contracts to female and minority businesses as a prime contractor.

IV. EFFECT OF PURCHASING PRACTICES ON WOMEN AND MINORITY BUSINESSES

In order to more fully understand the operation of the State's purchasing system and its effect on the contracting possibilities of women and minority owned business, interviews were conducted with past and present purchasing officials. The results are summarized below, without any attempt to reconcile minor differences between them, nor to arrive at any ultimate conclusions based on their opinions.

A. EARL JOSEPHSON

Earl Josephson served as Director of the Division of Purchase and Property from July 1975 to March 1983, spanning much of Governor Byrne's terms and the early portion of Governor Kean's first term. Mr. Josephson came to the position from a distinguished career as an investigative reporter to be one of the key players in Governor Byrne's program of "open government". He recalls that his earliest concerns dealt with reforming leasing practices which had been the source of scandal in earlier administrations. (The Secretary of State and the Treasurer in the last administration of Democratic Governor Richard Hughes and the same officials in the administration of Republican William Cahill had been indicted.) Prior to his tenure, leases for State office space were not the subject of competitive bidding and could be "negotiated" with few controls. He administratively introduced elevated "documentation standards" requiring the creation of a negotiation file containing evidence of

comparable leases, clear statements of rent per square foot and the lessor's rate of return on investment.

Another problem area was the awarding of contracts for professional services. Contracts for such services as engineering, architecture and auditing were awarded on waivers because it was asserted that "professional competence" could not be bid. Josephson developed a program whereby professional competence was determined by a committee according to predetermined criteria. Persons so qualified were asked to submit sealed bids. The Committee then selected a bidder and recommended to the Director of Purchase and Property that an award be made. The Director could accept or reject the recommendation. According to Josephson, the procedure had the effect of "opening up the process" and made it difficult for "political connection" to play a role. He acknowledges, however, that there was still room for "subjective considerations" to enter into committee's deliberations.

In Earl Josephson's opinion, the steps which he instituted during his early days as Director brought greater credibility to the bidding process but may have added force to the "institutional headwinds" facing small business as it sought to make inroads into government purchasing of goods and services. For example, in the unlikely circumstances that a woman or minority business had the political connections to obtain a non-bid lease in the "old days", it would now be faced with new obstacles. As was more probably the case, the WBE or MBE, not having any "old boy" opportunity, would still be unable to cope with the more complex process of obtaining a government contract. "Institutional headwinds", the term graphically

used by Mr. Josephson, consisted of a variety of components. In addition to the welter of paper work alluded to above, Josephson believed that "small businesses" were negatively impacted by requirements for bid and performance bonds. (It should be noted that Josephson's observations relate to small business. He does not separate out WBE's or MBE's.) Under Josephson, the requirement for 10% bid bonds (a bond which guarantees price) was eliminated. He also mandated that buyers affirmatively act to expand bidder's lists rather than rely upon those who had always had the business, and he redefined the buyer's role to allow for more paraprofessional titles. This latter effort brought more minorities into the process.

Earl Josephson believes that during his tenure more minorities and women's organizations were "pushing at the door" and that so far as their participation was concerned "things were better at the end of his time."

B. TOM BUSH

During his extensive career in State government, Thomas Bush served in a number of capacities related to purchasing. From 1977 to 1984 he was Deputy Director of the Division of Purchase and Property. He was Deputy Director of the General Services Administration from 1984 to 1988, and became Director of the Division of Building and Construction in 1988 where he still serves.

Mr. Bush offers the following assessment of his responsibilities. At one time or another, he oversaw an annual \$700 million commodity and service procurement program; supervised a \$50 - \$70 million negotiated lease system and directed operation and maintenance programs, totaling \$25 to \$30 million, at the State House

Complex. He estimates that minorities and women constituted no more than 2% to 5% of those contracting with the State of New Jersey. He recalls that there was only one minority buyer employed by the State.

As is the case with Mr. Josephson, Mr. Bush explains the small number of contracts enjoyed by minorities or women, by reference to the purchasing process and its effect on small business. He points to four elements which negatively impact small business. "First, the delay by the State in paying its bills makes it difficult for small businesses which usually require "front-end" money and lack of borrowing power, to compete. The recently enacted "prompt payment" statute calling for payment within 60 days does not entirely correct the problem.

Secondly, small bidders are discouraged by the complicated process which became even more complicated as the State sought to prevent corruption. For example, shareholder disclosure requirements might have discouraged the involvement of the "wrong" people in government contracting. It might also have become another confusing piece of paper for the small business person. So too, as a way of discouraging the award of contracts based on political consideration, more emphasis was placed on experience and demonstrated competence which in turn made it more difficult for new enterprises to gain access to the process.

Thirdly, many of the State's contracts call for performance over a statewide basis. Most small businesses are likely to be locally or regionally based.

Finally, and most significantly, according to Bush, are performance bond requirements, which increased in response to honesty concerns. The problem

continues despite changes in recent years which now permits waivers in construction contracts under \$100,000 and commodity contracts under \$20,000. Bush contends that the State should set up a program which would have it purchase blanket performance bond protection which would be available to insure performance of all contracts. He says this has been "talked about" for years but no action has been taken.

Bush recalls that in the early 1980's Senator Wynona Lipman began to pressure the State for a fairer process for women and minorities in government contracting. These efforts led to the enactment of set-aside laws. Unfortunately, in Mr. Bush's judgment, the set-aside statutes never addressed the payment, bonding and opportunity problems previously noted.

Following the Attorney General's opinion on set-asides, the Division of Construction introduced a program requiring contractors to make a "good faith" effort to reach out for minority or woman owned sub-contractors. To overcome a prolonged "certification" process in the Department of Commerce, the Division now "registers" eligible businesses.

In addition to the suggested performance bond changes noted above, Bush recommends legislation which would raise the level below which formal advertisement is required; increase informal bidding below that same level; eliminate the need for paying prevailing wages for those contracts; and require prompt payment within 30 days. All small businesses would benefit from such changes in Bush's judgment.

C. GIULIO MAZZONE

Giulio Mazzone has worked for the State of New Jersey since 1952. In 1965 he began work for the Purchase Bureau in printing control. He became a buyer the late 1960's and in 1973 he was promoted to Supervisor of the Purchase Bureau.

Mr. Mazzone's recollection of events and procedures in the State's purchasing program closely tracks that of Josephson and Bush. He does believe that the set-aside program helped some minority and woman owned businesses particularly in the area of photocopying, and he made some specific observations regarding discretion in the using agencies which are discussed below.

D. PATRICK KENNEDY

Patrick Kennedy, Assistant Director of Purchase and Property on two separate occasions, 1977 - 1979 and 1981 - 1983, generally corroborated the observations of the others. He emphasized that the system operated in such a way as to disadvantage small business and that the MBE's and WBE's were disadvantaged only in so far as they were small businesses. Small was the problem.

He too recalled that performance bond requirements injured the small businesses the most and that a State program of acquiring blanket performance bonds, available to all otherwise qualified bidders, was discussed but never implemented.

E. DISCRETION

Clearly, the development of purchasing statutes, rules and regulations was designed to limit unfettered discretion on the part of government officials in the awarding of contracts.

We explore here those areas of discretion remaining in our system which provide an opportunity for discrimination against minorities or women.

Mr. Mazzone describes areas in the system where discretion is available. Generally those areas involve using agencies. Under existing practice, the using agency is permitted to award any contract up to \$2500 on the basis of telephone quotes. Contracts in amounts in excess of \$2500 up to the waiver amount of \$7500 can be awarded on the basis of three written quotes. The using agency can then request a waiver on contracts over \$7500 where certain statutory exceptions such as professional services, sole source, compatibility of equipment exist. These waivers are only scrutinized by the Treasurer for adherence to statute.

Under Title 27, the Department of Transportation is exempt from the general bidding statutes and ordinarily negotiates rather than bids professional services.

It should be noted that discretion can be exercised in favor of, as well as against, women and minorities.

V. THE PROFESSIONAL SERVICE EXCEPTION TO PUBLIC BIDDING

As set forth previously, New Jersey's Public Contracts Law contains several exceptions to public bidding. These exceptions provide a potential for excluding new businesses from being awarded state contracts by maintaining the status quo. One such exception is the professional services exception. Bidding is unnecessary when "the subject matter thereof [of the contract] consists of services to be performed by

the contractor personally which are of a technical or professional nature."⁴⁵ This exception places no limit on the aggregate amount of any professional contract.

The bidding statute does not provide a definition of professional services. However, some guidance as to what the Legislature intended by professional services is found in the Local Public Contracts Law.⁴⁶ It should be pointed out at the onset, and as discussed below, that the New Jersey Supreme Court has rejected heavy reliance on the definition found at N.J.S.A. 40A:11-2 when construing the scope of the same professional services exception in another bidding statute.⁴⁷

Despite the Supreme Court's decision, the definition found in the Local Public Contracts Law does provide limited insight into the scope of the professional services exception section found at N.J.S.A. 52:34-9. The term "professional services" is defined in the Local Public Contracts Law as:

services rendered or performed by a person authorized by law to practice a recognized profession whose practice is regulated by law, and the performance of which service requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.⁴⁸

The statutes and regulations, unfortunately, do not define the term "profession." Guidance is provided by various court decisions. As noted in Atlantic Mutual Ins. Co., v. Continental Nat'l American Ins. Co., 123 N.J. Super. 241, 246

⁴⁵ N.J.S.A. 52:34-9.

⁴⁶ N.J.S.A. 40A:11-1 et seq.

⁴⁷ Autotote Ltd. v. Sports and Expo. Auth., 85 N.J. 363 (1981)

⁴⁸ N.J.S.A. 40A:11-2(iv).

(Law Div. 1973), the essence of a professional service is that it involves specialized knowledge in a labor or skill predominantly mental or intellectual rather than physical or manual." (emphasis in original). Furthermore, as noted in Burlington Twnsp. v. Middle Dept. Inspection Agency, Inc., 175 N.J. Super. 624, 631 (Law Div. 1980), a "profession inherently requires obtainment of special knowledge as distinguished from your skill."

In Autotote Ltd. v. N.J. Sports & Expo Auth., 85 N.J. 363 (1981), the Supreme Court noted that "if the law is to keep pace with scientific developments in business and commerce, it must adapt statutory provisions ... to the realities of the day." The Autotote case is the lone Supreme Court case which considered the issue of what constitutes "professional services." In Autotote, the statute at issue, N.J.S.A. 5:10-1 et seq., contained an exception to bidding for services of a professional or technical nature which is the same as the exception found in New Jersey's public bidding statute. In addition, the statute at issue in Autotote did not contain a definition of professional service. Thus, with regard to the professional service exception to public bidding, the statute at issue in Autotote and the public bidding statute with which we are concerned are identical. The Supreme Court in Autotote determined that the installation and servicing of betting machines was a professional service. As the court noted, the betting system requires specially trained technicians to supervise the day-to-day operations and that the need for science knowledge and professional skill was

sufficient to fit within the exception to competitive bidding requirements for the provision of professional services.⁴⁹

Significantly, the Autotote court expressly rejected the Appellate Division analysis of the term "professional services" which relied heavily on the definition found in New Jersey's Local Public Contracts Law at N.J.S.A. 40A:11-2. The court stated:

We do not find the legislative definitions of 'professional services' in another of our public bidding statutes, the Local Public Contracts Law, N.J.S.A. 40A:11-2 to be helpful in our attempt to ascertain the scope of the exception in N.J.S.A. 5:10-21 ...⁵⁰

While it may appear reasonable to assume that the Legislature intended that the extent of the professional service contract exception to be the same in N.J.S.A. 40A:11-2 and N.J.S.A. 5:34-9, the Autotote decision does not support such an assumption. Likewise, the Autotote decision suggests that the extent of the professional service contract exception in New Jersey's public bidding statute is different than that found in the New Jersey Local Public Contracts Law. Autotote advocates the need for flexibility in determining what a professional service is because it necessary to adopt statutory provisions which keep pace with scientific developments in business and commerce.

It is clear from the decision that, with regard to New Jersey's bidding statute, the term "professional services" is no longer limited to the traditional professions such as law, medicine, engineering, accounting and architecture. In light of the Supreme

⁴⁹ Autotote Ltd., Supra., at 371-72.

⁵⁰ Autotote Ltd., Supra. at 371.

Court's directive for flexibility, the professional services exception to bidding found in New Jersey bidding statute provides the Director of Purchase and Property significant and ample authority to bypass the bidding process. This discretion, however, is not unlimited. The Director of the Division of Purchase and Property may only award a professional service contract without advertisement with the written approval of the state Treasurer.⁵¹

VI. OTHER ALTERNATIVES

The Croson opinion specifically suggests the adoption of race neutral methodology to increase accessibility of minority businesses to public contracts. The court stated:

Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority businesses without classifying individuals on the basis of race.⁵²

Several bid requirements which have a chilling effect on the opportunities available to minority and women owned businesses. There are several race/gender neutral steps which New Jersey can implement which would increase the number of women and minority owned businesses bidding on State contracts.

⁵¹ N.J.S.A. 52:34-8.

⁵² Croson, supra, 109 S. Ct. at 729-730.

It is often difficult for new and small businesses to obtain the surety bonds required of bidders on public contracts. The State could waive the bond requirements for pre-qualified bidders on small contracts.⁶³ Such a procedure is utilized by the federal government pursuant to the Small Business Act.⁶⁴ Alternatively, the State could adopt a bonding assistance program whereby it would guarantee a portion for the bond provided to a small and emerging business.

Another significant obstacle to the participation of women and minority businesses in public contracting is the inadequacy of capital necessary to support an emerging business. Information concerning programs of financial assistance should be disseminated. The State of New Jersey created the New Jersey Economic Development Authority ("EDA") as a lending agent in order to accomplish several specific economic development goals. The criteria used by EDA is sometimes not as difficult to meet as the parameters of private lending institutions. In return, the successful applicant agrees to certain job creation requirements as well as the creation real estate ratables. In addition the Small Business Administration is a federal program

⁶³ Securing a surety bond is similar to obtaining a bank line of credit. The surety company must be satisfied that the contractor/vendor has met certain criteria. The firm must:

- Be of good character;
- Have the capacity to meet the requirements of the project;
- Have the necessary capital to support expected project costs;
- Be in good standing with a bank, i.e. have an established a line of credit; and
- Be a business that is well managed.

For emerging businesses, the greatest obstacle to obtain a bond is having the necessary capital to support the expected project costs.

⁶⁴ 15 U.S.C. section 635 (j).

providing financial assistance irrespective of geographical location and with few restrictions as to the type of business.

The problem of lack of capital can also be mitigated by more rapid payment of the invoices of prime contractors by the contracting agency. In 1987, the Legislature recognized this concern and, in an attempt to deal with the processing delays and the costs associated with such delays to vendors, implemented legislation entitled the New Jersey Prompt payment Act.⁵⁵ The Prompt Payment Act requires the payment of interest on bills not paid within 60 calendar days from the receipt by the State of a properly executed State invoice, or 60 days from the receipt of goods or services whichever is later. However, the Prompt Payment Act further provides that the State Treasurer may waive the interest payment for the delinquencies due to circumstances beyond the control of the recalcitrant agency. Moreover, because the Prompt Payment Act recently went into effect, it is difficult to determine what, if any, impact the Act has had upon the speed with which the State pays its bills.

Despite the provisions of the Act, which allow the Treasury Department to exercise discretion in the granting of interest, the bill is significant in that it shows recognition of the general problem, and provides an inherent incentive for payment of bills since interest payments are paid directly by the delinquent State agency.

Increasing the frequency of payments to prime contractors on public projects might also alleviate the capital shortage problem for subcontractors. In addition, if the State retains amounts from each progress payment under a construction contract, it

⁵⁵ N.J.S.A. 52:32-43(b).

could allow such retention only for cause rather than as a matter of course. The retained money could be deposited in an interest bearing account and the principal and accrued interest released when the problem is cured.

Small and emerging businesses are often precluded from participation in public bidding because they are unaware of contracting information or how to avail themselves of the opportunity to bid. This problem can be easily overcome by engaging in a market outreach program designed to increase the flow of bidding information to potential bidders. Such a program could specifically target minority communities.

The final obstacle to successful bidding is that women and minority businesses often suffer from a lack of managerial training and experience. The State could combat this problem by sponsoring programs intended to improve the managerial skills of small and emerging businesses.