

**NEW YORK CITY
MINORITY & WOMEN OWNED
BUSINESS ENTERPRISE
PROGRAM**

Martha Mann Alfaro
New York City Law Department

Sources

- Charter § 1304
 - 1989 referendum adopting recommendations of the Charter Revision Commission
- Administrative Code § 6-129
 - Local Law 129 of 2005
 - Minority & Women Owned Business Enterprises
 - Local Law 12 of 2006
 - Emerging Business Enterprises
(Socially & Economically Disadvantaged)
 - Local Law 1 of 2013

Department of Small Business Services Rules

- Certification of MWBEs – 66 RCNY § 11-21 et seq
- Certification of Emerging Business Enterprises – 66 RCNY § 11-81 et seq
- Program Rules – 66 RCNY § 11-60 et seq

Eligibility for MBE/WBE certification

51% ownership held by women or minorities who are citizens or permanent residents

Ownership must be real, substantial & continuing

Owners must have & exercise authority to control independently day to day business decisions

Firms owned by women who are minorities

- May be certified as both MBEs and WBEs
- May be counted by an agency and a contractor toward either a goal for MBEs or a goal for WBEs (but not both)

Emerging business enterprises

- 51% ownership by citizens or permanent residents
- Ownership is real, substantial & continuing
- Owners must have & exercise authority to control independently day to day business decisions
- Owners are “socially & economically disadvantaged”

Economic disadvantage

Net worth must be less than \$1M,
excluding ownership interest in the
business enterprise and equity in primary
personal residence.

Social disadvantage

Objective distinguishing feature that has contributed to social disadvantage, such as physical or mental disability, long-term residence in environment isolated from the mainstream U.S. society, or other similar causes not common to individuals who are not socially disadvantaged; and

Personal experiences of substantial and chronic social disadvantage in U.S. society; and

Negative impact on entry into or advancement in the business world because of the social disadvantage.

Certified firms must have nexus to City's geographic market

- (1) Principal office or place of business or headquarters is located within the City; or
- (2) Full-time employees in offices within the City to conduct or solicit business in the City the majority of their working time; or
- (3) Principal office or place of business or headquarters is located within the geographic market of the City, and (i) has transacted business more than once in the City within the last 3 years, or (ii) has sought to transact business more than once in the City within the last 3 years; or
- (4) 25% of annual gross receipts for the last 3 years were derived from transacting business in the City; or
- (5) 2 or more of the following: (i) the business has maintained a bank account or engaged in other banking transactions in the City; (ii) the business, or one of its owners, possesses a license issued by a City agency to do business in the City; (iii) the business has transacted/sought to transact business in/with the City more than once in the past 3 years.

Qualified joint venture

- Joint venture between one or more MBEs, WBEs and/or EBEs and another person
- MBE/WBE/EBE must be entitled to at least 25% of profits, exposed to at least 25% of losses

Graduate MBE/WBE/EBE

- Has been awarded contracts within past 3 years where total City funding was \$50M or more, and
- Size has exceeded standard for relevant industry by U.S. Small Business Administration for 3 years

Graduates

Contracts and subcontracts performed by “graduates” don’t count toward goals

Firms can apply to have “graduate” designation lifted after 2 years by demonstrating that they have been below the relevant SBA size standards for 2 years.

ANNUAL CITYWIDE GOALS			
CONSTRUCTION		STANDARD SERVICES	
Black American	8%	Black American	12%
Asian American	8%	Asian American	3%
Hispanic American	4%	Hispanic American	6%
Women	18%	Women	10%
Emerging	6%	Emerging	6%
PROFESSIONAL SERVICES		GOODS UNDER \$100K	
Black American	12%	Black American	7%
Asian American	--	Asian American	8%
Hispanic American	8%	Hispanic American	5%
Women	17%	Women	25%
Emerging	6%	Emerging	6%

Disparity study & updates

- Citywide goals are based on a study comparing availability & utilization of MBEs & WBEs in City procurements.
- Goals are set for categories where significant underutilization is found.
- Law requires Commissioner of SBS, in consultation with City Chief Procurement Officer, to review availability and utilization every 2 years, and adjust goals by rule as appropriate.

Agency annual utilization plans

- Agency goals are set annually
- Considerations:
 - Citywide goals
 - Size & nature of agency's procurements
 - Availability of MBEs, WBEs & EBEs with capacity to perform specific types & scale of work the agency anticipates

Goals for individual procurements

- Factors:
 - Scope of work
 - Availability of MBEs, WBEs and EBEs
 - Prime contracting and subcontracting opportunities within their capacity
 - Agency's progress in meeting its annual goals through race- and gender- neutral means
 - Other relevant factors

Options for goals

- Agency may establish specific goals for particular services
- Agency may establish goals for particular types of certified firms (e.g. owned by Black Americans or Asian Americans or Hispanic Americans or Women or Economically/Socially Disadvantaged)
- Agency may specify that goals can be achieved by
 - Combination of prime contract & subcontract dollars
 - Combination of construction and services
 - Combination of MBEs, WBEs and/or EBEs

Credit

- Contractor that is a certified MBE/WBE/EBE may count own participation, after subtracting amounts awarded to subcontractors
- Contractor may count participation of subcontractors that are certified MBEs/WBEs/EBEs
- Qualified joint venture may count own participation, after
 - subtracting amounts awarded to subcontractors
 - multiplying the remainder by percentage of profit to which the MBE/WBE/EBE partner is entitled under the JV agreement

Credit for subcontractors' subcontractors

- The City Chief Procurement Officer may identify types of contracts where payments made to “indirect subcontractors” are credited toward the relevant goals.

Waivers (full or partial)

- A bidder/proposer may ask agency to reduce goal
 - on grounds it is unreasonable in light of availability of certified firms, or
 - by demonstrating it has legitimate business reasons for proposing lower level of subcontracting

Agency decisions on waivers

- Based on whether bidder/proposer has capacity and bona fide intention to perform contract without subcontracting, or without as much subcontracting as contemplated by the goals
- Considering
 - past practice of bidder/proposer
 - whether it made efforts to form a qualified joint venture
 - whether it made good faith efforts to identify portions of contract it intends to subcontract

Modifications

- May be granted at contractor's request or agency's initiative when agency determines contractor has made all reasonable good faith efforts to meet the goals.

Factors demonstrating good faith

- Advertising in general media, professional publications, and publications of minority and women's organizations
- Timely notice to minority and women's organizations
- Written notice to solicit M/W/EBEs
- Efforts to identify work that could be substituted for portions originally designated for M/W/EBEs
- Meetings with M/W/EBEs prior to due date of bid/proposal
- Efforts to negotiate with M/W/EBEs
- Timely requests for assistance to agency MWBE officer and SBS
- Description of how their recommendations were acted upon and why they did not lead to desired level of participation

Changes in scale/scope

- Agency may modify participation goals when it has changed scope of work in manner affecting scale & type of work that contractor's utilization plan indicated would be awarded to subcontractors.

Procurement Policy Board

- PPB has 3 appointees of the Mayor and 2 appointees of the Comptroller
- Charter § 311(b)(8) directs PPB to issue rules for making small purchases “in a manner that will advance the purposes of the program for minority- and women-owned business enterprises and emerging business enterprises” established pursuant to Charter § 1304(b).

PPB Rules

- **Micropurchases.** For procurements of construction up to \$35K, and goods and all other services up to \$20K, no competition is required. Contracting Officers must ensure that the noncompetitive price is reasonable and that purchases are distributed appropriately among responsible vendors, including M/WBE vendors. 9 RCNY § 3-08.
- **Small Purchases.** For procurements of construction between \$35K and \$100K, and goods and all other services between \$20K and \$100K, at least 5 vendors must be solicited at random from the appropriate citywide small purchases bidders list 9 RCNY § 3-08. The Mayor's Office of Contract Services has instructed agencies to solicit at least 10 MWBEs in addition to the 5 vendors solicited at random.
- **“Innovative rule”** implementing Charter amendments on **“discretionary spend”** enacted by Chapter 504 of 2017: No formal competition will be required for the procurement of goods and services to City-certified M/WBEs between \$20K and \$150K, except that in making such purchases, agency contracting officers should obtain price or rate quotations from at least 3 City-certified M/WBE vendors

PPB Rules

- **Best value method for goods and standard services** – A certified M/WBE in a group for which there is a goal established must, except with the permission of the City Chief Procurement Officer, be given a price preference of 10% and will be evaluated as if the bid price were 10% lower. 9 RCNY § 3-02(o)(implementing authority under General Municipal Law § 103(1) to use the best value technique)
- **Best value method** expanded by Chapter 504 of the Laws of 2017
 - Best value technique may also be used for professional services.
 - May consider bidder's record of complying with existing labor standards, maintaining harmonious labor relations, and protecting workers' health and safety
 - May award points to City-certified MWBEs
 - Chapter amendment S7293/A 8995 requires that points be awarded to State-certified as well as City-certified MWBEs.

PPB Rules

- **Prequalified lists** - allows for consideration of “demonstrated commitment to working with minority and women-owned businesses through joint ventures or subcontractor relationships.” 9 RCNY § 3-10. (Authorized by General Municipal Law § 103(15)).

New York City Housing Authority Modernization Investment Act

- Part LLL, § 2(b) of 2018 NY Budget bill
S7509-C/A 9509-C: authorizes use of best
value by NYCHA and New York City
Department of Design and Construction, with
points for State and City certified MWBEs

Industrial and Commercial Abatement Program

- Real Property Tax Law §§ 489-ddddddd and 489-kkkkkk authorize City to require meaningful participation of MWBEs in construction work.
- Ad. Code § 11-278, 19 RCNY § 36-03(c): For projects >\$1.5 million (or \$750K, after May 5, 2018) applicant must inform City of contract and subcontract opportunities, and must solicit at least 3 MWBEs for each subcontract.

Department of Housing Preservation and Development

- Ad. Code § 4-120 Minority and women-owned business enterprises (L of 2014, Ch. 461): “Notwithstanding any provision of state or local law to the contrary, any agency of the city making a loan or disposing of property pursuant to [the Private Housing Finance Law, or General Municipal Law Articles 15 or 16] may implement such measures as are appropriate and consistent with the equal protection clause to facilitate and encourage meaningful participation by minority or women-owned business enterprises.”
- In 2013 HPD completed an in-house disparity study about developers.

HPD's M/WBE Build Up Program

- Developers/borrowers must spend at least a quarter of HPD/HDC supported costs on certified M/WBEs over the course of design and construction of certain HPD/HDC-subsidized projects.
- All payments to certified M/WBEs performing construction or providing professional services count toward the goal.

HELPFUL TOOLS

Start a Business

Operate & Grow

Certify with the City

Benefits of Certification

Contracting Opportunities

M/WBE Leadership Association

Facebook Twitter Google+ Tumblr Email Share

Print

Certify with the City



Learn more about:



Home Advanced Search Get Connected

[About Us](#) | [Disclaimer](#) | [Email Us](#)



NYC Online Directory of Certified Businesses

Connecting City agencies and other buyers with certified businesses

The Online Directory of Certified Businesses is a searchable list of M/WBE, LBE, and EBE certified businesses across the New York City area. You can find details and contact information about these firms, as well as what these companies sell or provide.

Search by Company Name or Job Experience

[Advanced Search](#)

Search terms in the MWBE Directory

- Industry type
- Largest contract experience
- Aggregate bonding limit
- Union firm?
- Location



City Record

Procurement Plans

Contracting Agencies

Share Print (social media icons)

Contracting Opportunities

The first action a new vendor should take to do business with the City of New York is register in the Payee Information Portal (PIP), which will enroll them onto the City's Bidders' Lists based on commodity code selections. By being on a City Bidder List, a vendor may receive notices about solicitations, including those not advertised elsewhere.

There are multiple ways to find out about procurement opportunities:

- All City solicitations valued above \$100,000 are advertised in [The City Record On-Line \(CROL\)](#).
- Many contracting agencies also list their current, as well as upcoming, bid solicitations and Requests for Proposal (RFPs) on their [individual websites](#).
- In many cases, City agencies are required to list [procurement plans](#) which detail future procurement actions they plan to make.
- Vendors who are looking to partner with the City to provide Human Client Services can find out about contracting opportunities through [Health and Human Services Accelerator](#).



Contracting Opportunities for MWBEs

The City of New York spends billions of dollars each year on goods and services – and we have set an ambitious goal to extend more of these opportunities to minority and women-owned businesses. Get certified and gain access to the City's latest business opportunities.

All City business opportunities valued above \$100,000 are advertised on the City Record Online (CROL). View opportunities on CROL by using these filters: "Section: Procurement" and "Notice Type: Solicitation." [Sign up for email alerts](#) for business opportunities that are relevant to your business.

New York State Minority and Women-Owned Business Enterprise Program State Agency Perspective

Prepared by:
Noreen VanDoren, Supervising Attorney and Ethics Officer¹
New York State Office of General Services

Legal Requirements

Article 15-A of the New York State Executive Law was enacted in 1988 and created a Division of Minority and Women's Business Development (DMWBD) within the New York State Empire State Development Corporation (ESD). The DMWBD has the right and responsibility to issue regulations and oversee State agency and authority contracting responsibilities regarding Equal Employment Opportunities and Minority and Women-owned Business participation. The purpose of Article 15-A is to ensure and promote fair and equal employment and minority and women-owned business participation in State contracts through the establishment of goals for minority- and women-owned business participation. Regulations further detailing the MWBE requirements are set forth in 5 NYCRR 140-145.

The MWBE law and regulations apply to all state contracts defined as:

- (1) A written agreement and amendment(s) thereto, providing for a total expenditure in excess of \$25,000, whereby a State agency is committed to expend or does expend funds in return for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;
- (2) a written agreement in excess of \$100,000 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon;
- (3) a written agreement in excess of \$100,000 whereby the owner of a State-assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project;
- (4) leases of real property by a State agency to a lessee where the terms of such leases provide for the State agency to be engaged in construction, demolition, replacement, major repair or renovation of real property and improvements thereon, and the cost of such construction, demolition, replacement, major repair or renovation of real property and improvements thereon is in excess of \$100,000;
- (5) all revenue contracts, as defined in State Finance Law section 139-j.

It is the responsibility of ESD to certify that woman or minorities own at least 51% of the business seeking certification and that the requesting women or minorities actually operate the business. Some other requirements to become certified are a limitation on the net worth of the owner(s), the business cannot be dominate in its field or employ more than 300 people as well as other criteria. On the ESD web site is a searchable database of certified business to assist both contractors and agencies in locating MWBEs to participate on state contracts.

¹ This presentation is based upon the practices followed within the New York State Office of General Services. The information provided herein has not been reviewed or endorsed by the Division of Minority- and Women-Owned Business Development within Empire State Development. Any opinions expressed are solely my own and do not necessarily represent the views or opinions of my employer.

Annual State Agency Goal Requirements

Each state agency and authority must submit to ESD an annual agency MWBE goal plan including goals expressed as a percentage of aggregate agency/authority expenditures; justification for such goals; an estimate of the number of contracts containing MWBE requirements; a description of the procedures implemented to meet the goals and identification of the personnel within the agency responsible for compliance, including their title, description of responsibilities, and percentage of time allocated to the program, and the agency/authority organizational chart showing lines of authority and reporting between these persons and the executive staff. A 2016 Disparity Study conducted by ESD recommends that the State continue to work to achieve Governor Andrew Cuomo's 30% MWBE participation goal and that New York State undertake new and more targeted efforts to support MWBE prime contractors. The results of the 2016 MWBE Disparity Study can be viewed at: <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-reports>

All state agencies and authorities are also required to submit to ESD quarterly compliance reports indicating the number, dollar value and expenditures for: 1) all agency contracts awarded; 2) contracts awarded directly to MWBEs; 3) contracts with MWBE goals; 4) contracts with MWBE goals and a utilization plan in place; 5) contracts with MWBE goals that have received a waiver of compliance; 6) justification for each waiver; and 7) a determination of compliance with the agency goal plan. Guidelines for these quarterly reports are located at: https://esd.ny.gov/sites/default/files/AgencyGuidelines_AgencyUtilizationReportingForms.pdf

Office of General Services (OGS) Practices

A. Overview

When developing a Solicitation for a State contract, the agency must assess the procurement to determine if MWBEs would be able to participate in the contract as subcontractors or suppliers to the winning contractor and if so, MWBE goals will be considered for inclusion in the contract.

In addition, if the Solicitation is a Request for Proposals (RFP), the agency must determine if it should award technical evaluation points to Proposers² based upon Quantitative Factors or Diversity Practices. OGS has developed a formalized MWBE review process for our various business units, each of which works closely with our OGS Office of Minority- and Women-Owned Business Enterprises (OGSMWBE) to ensure that we identify all possible opportunities for MWBE participation. This presentation focuses primarily on the process followed by OGS Procurement Services for Commodity and Services Contracts.

B. Quantitative Factors

When developing a Request for Proposals (RFP) awarding a procurement contract on the basis of Best Value, State Finance Law § 163(1)(j) allows a Contracting Officer to designate up to 5% of the total technical evaluation scale to be awarded to a Proposer who meets one of the following criteria³ (NOTE: Although a Proposer may meet more than one of the criteria, credit is to be awarded for only one category, not multiple categories):

²² The terms "Proposer" and "Bidder" refer to the company responding to a procurement solicitation.

³ Agencies must not evaluate both Quantitative Factors and Diversity Practices in the same procurement.

- (1) The Proposer is a New York State Certified Minority and Women-owned Business Enterprise (MWBE) as defined in Executive Law § 310; or
- (2) The Proposer is a New York State Certified Service-Disabled Veteran-Owned Business (SDVOB) as defined in Executive Law § 369(h); or
- (3) The Proposer is a Small Business (SBE) as defined in Executive Law § 310(20).

The above-referenced 5% designation included in the RFP technical evaluation is called a “Quantitative Factor.” Quantitative Factors are included when MWBEs, SDVOBS and SBEs are typically available in the particular industry to be the winning prime contractors.

C. Diversity Practices

Diversity Practices are the efforts of Proposers to include MWBEs in their business practices. Diversity Practices may include past, present, and future actions and policies, and include activities of Proposers on contracts with private entities and governmental entities other than the State of New York.

Executive Law § 313-a and 5 NYCRR § 142.3 allow for the scoring of a Proposer’s Diversity Practices in the technical evaluation of a best value procurement, RFP, or request for qualifications (RFQ). If scoring diversity practices of the Proposers, the RFP or RFQ will contain a Diversity Practices Questionnaire, which the Proposer must fill out to identify their diversity practices. The responses to the Questionnaire are scored according to a Diversity Practices Scoring Matrix, and then given predetermined weighting in the technical score for that vendor. The Questionnaire and Matrix were developed by ESD and are to be used where:

- (1) The resultant State contract will be awarded:
 - a. on the basis of best value, or
 - b. in response to a request for proposals (RFP), or
 - c. in response to a request for qualifications (RFQ); and
- (2) The resultant State contract will not be awarded on the basis of lowest price; and
- (3) The resultant State contract is anticipated to have a value of \$250,000 or greater (the anticipated aggregate spend should be considered in the case of multi-award procurements); and
- (4) Scoring for diversity practices in the procurement is practical, feasible, and appropriate; and,
- (5) The solicitation does not include a quantitative factor that awards points based on MWBE or SBE status pursuant to SFL § 163(1)(j)

A copy of OGS’ *Advisory Memorandum* providing detailed guidance on evaluating a Proposer’s Diversity Practices is provided as Attachment A.

D. MWBE Goal Setting

Every procurement for commodities and services having a value in excess of \$25,000 must be assessed for inclusion of MWBE goals. Each State agency is expected to spend 30% of its discretionary funds (not salaries, utilities, postage, travel reimbursement, telephones, sole source contracts, etc) with MWBE vendors. However, an agency cannot just set a 30% MWBE participation goal on each contract as there are some industries that still have insufficient MWBEs to set a goal and some contracts simply cannot involve a subcontractor or a supplier. There are hundreds of different types of industries providing goods and services to New York State agencies and authorities; therefore, there is no set formula for setting MWBE goals. There are however, some best practices followed by OGS to achieve maximum MWBE participation.

Factors that are considered are the scope of the work, subcontractor or supplier opportunities, geographical location, and number of certified MWBEs in the particular industry as well as the contract value. If the contract is for commodities, there will be limited opportunities for subcontractors unless there is a local delivery component. Alternatively, many technology and service contracts have abundant subcontracting opportunities. When OGS contracting officers are developing the solicitation document, they complete an OMWBE Goal Request Form providing as much detail as possible to the OGSMWBE to assist our staff in setting the MWBE goal for the contract. A copy of the OGS *MWBE Goal Request* form is provided as Attachment B.

OGSMWBE staff review the Goal Request Form and then search ESD's Directory of Certified Firms located within ESD's New York State Contract System: <https://ny.newnycontracts.com/> to determine the availability of certified firms in the industry. Sometimes calls are made to the firms to confirm they can perform the type of work that is needed. For example, a firm may be certified to perform trucking services, but does not have trucks to carry the type of commodity applicable for the subject contract. OGS issues contracts for diesel, #2 fuel oil, milk, road salt, etc., and most MWBE trucking firms have only one type of truck, so OGSMWBE could not set a MWBE goal based solely on the certification for delivery services. In addition, the location of MWBEs is very relevant when setting goals. If the MWBE is in Albany, and the procurement contract is for the Plattsburgh region, the cost of the transportation to participate in that contract will be too great for consideration in this particular procurement.

E. Utilization Plans

When MWBE goals are included in a Solicitation, all Bidders must submit with their bid, a Utilization Plan listing the MWBEs the Bidder intends to use to perform the Contract, a description of the Contract scope of work the Bidder intends the MWBE to perform to meet the goals on the Contract, and the estimated or, if known, actual dollar amounts to be paid to an MWBE. When submitting the Utilization Plan, the Bidder acknowledges that making false representations or including information evidencing a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments. Bidders also must agree that any modifications or changes to the agreed participation of MWBEs identified within the Utilization Plan after the Contract award and during the term of the Contract must be reported on a revised MWBE Utilization Plan submitted to OGS.

Upon receipt of the Utilization Plan, OGSMWBE staff review the plan and work with the Bidder to ensure the Bidder engages in good faith efforts to meet the MWBE goals set on the contract. If the goals cannot be met, despite the good faith efforts of the Bidder/Contractor, OGS may waive the initial goal requirement. Typically, waivers are not granted until the contract is almost complete, and the contractor has established to the satisfaction of OGS that every good faith effort was made for MWBE participation. Throughout the course of the contract, the Contractor must report all payments made to MWBE subcontractors and suppliers to meet the MWBE goal. Reporting is through the New York State Contracting System. As indicated above, the value of all of those payments are reported by the agency to ESD quarterly, to meet the agency's MWBE annual goal requirements.

A copy of the OGS Contractor Requirements and Procedures for Participation by New York State Certified Minority- And Women-Owned Business Enterprises And Equal Employment

Opportunities For Minority Group Members And Women used in OGS Procurement Services contracts when MWBE goals have been set, is provided as Attachment C.

F. Discretionary Buying Thresholds

Pursuant to State Finance Law (SFL) § 163(6), State agencies may be able to purchase commodities or services directly from MWBEs, SDVOBs, and SBEs, in an amount not exceeding two hundred thousand dollars without a formal competitive process. State agencies must follow the order of purchasing priority set forth in SFL § 163 and must first determine whether the agency's form, function and utility requirements can be met through (1) Preferred Source Offerings, (2) OGS Centralized Contracts and, (3) the agency's previously established contracts.

Form, function and utility requirements are the minimum essential requirements that will meet the agency's needs and are defined by the agency. Requirements may include quality, quantity, delivery terms, packaging, performance standards, and compatibility, among others. If no Preferred Source, OGS Centralized Contract, or existing Agency contract meets the agency's need, the State agency may conduct its own procurement and limit the participation to MWBEs if the total value of the resulting contract will not exceed \$200,000, over the entire life of the contract.

Detailed guidance on how to conduct a discretionary purchase limited to MWBEs is located at:

<https://ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf>

Awarding the contracts directly to MWBEs means that 100% of the spend on that contract goes towards the agency's annual MWBE goal requirement, rather than just the 30% participation level when the MWBE participated in the State contract as a subcontractor or supplier.

Conclusion

Government has a responsibility to guard against institutionalized barriers that prevent members of our community from selling their goods and services to government entities. Many government contracts need large and experienced prime contractors to meet the full terms and conditions of the contract and small businesses owned by MWBEs typically do not have the resources or experience to compete for State contracts.

Through the MWBE program, State agencies and authorities are providing MWBEs with the opportunity to participate in State contracts as subcontractors and suppliers. Through this participation, MWBEs obtain experience working on government contracts and can grow their business, and eventually obtain the necessary bonding and insurance coverage that is required for the MWBE to be able to compete for the prime contracts on their own.



Office of General Services

ADVISORY MEMORANDUM

March 30, 2016

To: Senior Staff*

From: Bradley G. Allen, Deputy Commissioner and Counsel

Subject: Advisory Memorandum # 2016-01
MWBE Diversity Practices Technical Evaluation Criteria for Certain Procurements

Issued to: OGS Employees Responsible for Developing and Awarding Best Value Contracts

I. Summary

Diversity practices are the efforts of vendors to include New York State certified minority- and women-owned business Enterprises ("MWBEs") in their business practices. Diversity practices may include past, present, and future actions and policies, and include activities of vendors on contracts with private entities and governmental entities other than the State of New York.

Executive Law § 313-a and 5 NYCRR § 142.3 allow for the scoring of a vendor's diversity practices in the technical evaluation of a best value procurement, request for proposal, or request for qualifications as detailed hereafter. For those procurements in which diversity practices will be scored (see below), OGS staff must include in the solicitation a Diversity Practices Questionnaire, which will require the bidder to respond to questions geared to identifying diversity practices within the bidder's company. The responses to the Questionnaire are scored according to a Diversity Practices Scoring Matrix, and then given predetermined weighting in the technical score for that vendor.

II. When Diversity Practices Apply

Diversity practices will be scored in a procurement where:

The Advisory Memorandum is intended to provide a general guideline for agency personnel based upon the facts and limitations set forth above. Since this guideline is based upon the law reported as of the date of issue and is subject to any subsequent changes, the advice of counsel should be sought prior to use or reliance as to a particular fact or circumstance.

March 30, 2016

1. The resultant State contract will be awarded:
 - a. on the basis of best value, **or**
 - b. in response to a request for proposals ("RFP"), **or**
 - c. in response to a request for qualifications ("RFQ"); **and**
2. The resultant State contract will not be awarded on the basis of lowest price; **and**
3. The resultant State contract is anticipated to have a value of \$250,000 or greater (the anticipated aggregate spend should be considered in the case of multi-award procurements); **and**
4. Scoring for diversity practices in the procurement is practical, feasible, and appropriate; **and**,
5. The solicitation does not include a quantitative factor that awards points based on MWBE or SBE status pursuant to SFL § 163(1)(j) (see Advisory Memorandum # 2014-2, *Technical Evaluation Criteria for Best Value Solicitations Procurements under State Finance Law § 163(1)(j)*); **and**
6. The solicitation does not include the award of points for a bidder's participation in a mentoring program, as will be described in a separate, future Advisory Memorandum.

If it is determined to be practical, feasible, and appropriate to score for diversity practices, the following **must be included in the solicitation**:

1. Appropriate language indicating that diversity practices will be scored (see form DP-Text);
2. The Diversity Practices Questionnaire (see DP-Questionnaire); and,
3. The Diversity Practices Scoring Matrix (see DP-Matrix).

III. Determining Whether to Use Diversity Practices, the Quantitative Factor, or Mentoring Program Participation

Procurements that meet the respective criteria may be scored on the basis of (i) diversity practices, (ii) a quantitative factor that awards points based on MWBE or SBE status pursuant to SFL § 163(1)(j) (see Advisory Memorandum # 2014-2, *Technical Evaluation Criteria for Best Value Solicitations Procurements under State Finance Law § 163(1)(j)*), or (iii) the vendor's participation in a mentoring program (detailed in a separate Advisory Memorandum). The solicitation cannot contain more than one such scoring factor.

The determination of whether to score for diversity practices, the quantitative factor, or mentoring program participation will be made by an OGS employee in a Contract Management Specialist 3 position or above, in consultation with the OGS Office of Minority- and Women-Owned Businesses and Community Relations ("MWBE Office"), taking into consideration the guidance outlined below.

The Advisory Memorandum is intended to provide a general guideline for agency personnel based upon the facts and limitations set forth above. Since this guideline is based upon the law reported as of the date of issue and is subject to any subsequent changes, the advice of counsel should be sought prior to use or reliance as to a particular fact or circumstance.

Diversity practices should be considered when MWBEs are not available in the particular industry as prime contractors, but are often used in the industry (and have appeared in the past on Utilization Plans) as subcontractors. If MWBEs keep appearing in the industry as subcontractors in the same niche roles, the hope is that scoring for diversity practices will allow prime contractors to use MWBE subcontractors in different ways.

The quantitative factor should be used when there are MWBEs in the industry, and as evidenced from prior awards, MWBEs are able to compete as prime contractors.

A vendor's participation in a mentoring program should be considered when there are MWBEs in the industry, but MWBEs have not been used on the particular type of procurement, as evidenced by prior Utilization Plans. This indicates that while there may be MWBE availability, there is a potential need for further training, etc. through a mentoring program that could lead to an increase in MWBE contract participation.

IV. Diversity Practices Scoring

The Diversity Practices Questionnaire (DP-Questionnaire) must be provided with the solicitation for bidders to complete and submit with the bid response. Responses to the questions will be scored as part of the technical evaluation, pursuant to the Diversity Practices Scoring Matrix (DP-Matrix). The Matrix must be provided with the solicitation, and outlines how the bidder's responses to the Questionnaire will be scored. Specific information on the questions found in the Questionnaire and how to score the responses is contained in the Diversity Practices Evaluation Tool (DP-Evaluation). Note that the response to Question 8 must be scored by the OGS MWBE Office. The evaluation team will review bidders' responses to the Questionnaire and score them according to the Matrix. The points received for all eight responses will be added to achieve a Total Diversity Score of up to 100 points. This Total Diversity Score will then be weighted, to achieve a weighted score of up to 5% of the total technical score.

For example:

1. If the total evaluation criteria is worth 100 points, weighted 60% financial and 40% technical, the Total Diversity Score would represent 5% of the 40% technical score or 2 out of 100 total evaluation points. However, if a bidder receives only 50 of the available 100 Diversity Practices points, it would receive only 1 of the 100 total evaluation points.
2. If the total evaluation criteria is worth 100 points, weighted 30% financial and 70% technical, the Total Diversity Score would represent 5% of the 70% technical score or 3.5 out of the 100 total evaluation points. However, if a bidder receives only 50 of the

available 100 Diversity Practices points, it would receive only 1.75 of the 100 total evaluation points.

V. Legal Authority

Executive Law § 313-a provides that the Director of the MWBE program at Empire State Development (“ESD”) may establish regulations setting forth procedures to require contracting agencies, where practical, feasible, and appropriate, to assess the diversity practices of contractors submitting bids in connection with the award of a State contract. The Director has adopted such regulations at 5 NYCRR Part 142.

5 NYCRR § 142.3 sets forth procedures for assessing diversity practices.

5 NYCRR § 142.14 provides that where diversity practices are not assessed in a solicitation, a quantitative factor awarding points to MWBEs/SBEs may be included.

VI. Attachments

- 1) Diversity Practices Solicitation Text (DP-Text)
- 2) Diversity Practices Questionnaire (DP-Questionnaire)
- 3) Diversity Practices Scoring Matrix (DP-Matrix)
- 4) Diversity Practices Evaluation Tool (DP-Evaluation)

DIVERSITY PRACTICES EVALUATION TOOL

This Diversity Practices Evaluation Tool contains the questions from the Diversity Practices Questionnaire (DP-Questionnaire) **in bold text** plus guidance, to be used by the evaluation team in conjunction with the Diversity Practices Scoring Matrix (DP-Matrix), on how to score the responses. The DP-Questionnaire and DP-Matrix must be included in the Solicitation. **DO NOT INCLUDE THIS DP-EVALUATION DOCUMENT IN THE SOLICITATION.**

- 1) **Does your company have a Chief Diversity Officer or other individual who is tasked with supplier diversity initiatives?**
 - a. If Yes, and bidder provides the requested information (name, title, description of duties, and evidence of initiatives performed by this individual or individuals) with the bid, 5 points must be awarded.
 - b. If Yes but bidder does not provide the requested information with the bid, 0 points must be awarded.
 - c. If No, 0 points must be awarded.

- 2) **What percentage of your company's gross revenues (from your prior fiscal year) was paid to New York State certified minority- or women-owned business enterprises ("MWBEs") as subcontractors, suppliers, joint-venturers, partners or other similar arrangement for the provision of goods or services to your company's clients or customers?**
 - a. Consider data only from the prior fiscal year and disregard any data provided from other fiscal years. In addition, any data regarding expenditures made to businesses certified as minority- or women-owned businesses by an entity other than the State of New York should be disregarded. Expenditures made to businesses with certifications other than NYS certified MWBE, such as Disadvantaged Business Enterprises and Service-Disabled Veteran-Owned Business Enterprises, are not to be considered in this analysis.
 - b. Points are assigned based on percentage of gross revenues paid to NYS certified MWBEs according to the Matrix (e.g., 0% = 0 points, 1-4% = 2 points, etc.).

- 3) **What percentage of your company's overhead (i.e., those expenditures that are not directly related to the provision of goods or services to your company's clients or customers) or non-contract-related expenses (from your prior fiscal year) was paid to MWBEs as suppliers/contractors?**
 - a. Consider data only from the prior fiscal year and disregard any data provided from other fiscal years. Do not consider onsite project overhead. In addition, any data regarding expenditures made to businesses certified as minority- or women-owned by an entity other than the State of New York should be disregarded. Expenditures made to businesses with certifications other than NYS certified MWBE, such as Disadvantaged Business Enterprises and Service-Disabled Veteran-Owned Business Enterprises, are not to be considered in this analysis.
 - b. Points are assigned based on percentage according to the Matrix (e.g., 0% = 0 points, 1-4% = 1 point, etc.).

4) Does your company provide technical training to minority- and women-owned business enterprises?

- a. Points are assigned based on an evaluation of the technical training program.
- b. Technical training is the process of teaching employees how to more accurately and thoroughly perform the technical components of their jobs. Training can include technology applications, products, sales and service tactics related to the particular industry, and more. Technical training is specific to the industry in question, and does not include generic training in skills that are transferrable across industries (soft skills).
- c. Examples of trainings that do not qualify as technical training include: trainings in managerial skills and leadership, effective communication, and professional development and networking.
- d. Examples of technical training topics include: the use, installation, or safe handling of particular products; the use of industry-specific IT; and industry-specific sales and customer service strategies.
- e. If the response is No or if the response is Yes but the training described does not qualify as technical training, a score of “none” or 0 points must be awarded.
- f. If the response is Yes and the training qualifies as technical training, the robustness of the technical training must be assessed by considering the following factors: the duration of the technical training program, the number of NYS certified MWBEs served, and the total number of hours devoted to technical training of NYS certified MWBEs. Typically, to achieve a score of “minimum” or 4 points, the bidder has provided technical training for one year or less, has provided fewer than one hundred hours of technical training, or has provided technical training to only one NYS certified MWBE in a contracting area for which there is significant NYS certified MWBE availability. If the bidder exceeds these standards, a score of “moderate” or “robust” may be given. To assist in your determination of minimum, moderate or robust, you must also compare the information provided by a Bidder in response to this question against the responses to this question submitted by all other Bidders.

5) Is your company participating in a government-approved minority- and women-owned business enterprise mentoring program?

- a. Points are assigned based on an evaluation of the mentoring program.
- b. If the response is No or if the response is Yes but the bidder does not provide the requested information (name, title, description of mentoring program, including time and resource commitments, government agency involved in regulating the program, etc.), a score of “none” or 0 points must be awarded.
- c. If the response is Yes, points may be awarded if the requested documentation has been provided which demonstrates the bidder’s participation in a mentoring program approved by a governmental entity. Such governmental entity need not necessarily be the State of New York. Appropriate documentation of the existence of a mentoring program will vary based upon the approving governmental entity. Only documents generated by a governmental entity should be accepted to demonstrate the existence of a mentoring program.

- d. A score of “robust” or 12 points may be awarded only if the following elements are met by the bidder’s mentoring program:
 - i. The mentee must be able to meaningfully participate in the delivery of contract requirements.
 - ii. For services contracts, at least one element of the scope must be performed by the MWBE with the prime contractor serving as mentor. Multi-year contracts must have a plan in place to expose the MWBE to each element of the scope through the lifetime of the contract.
 - iii. Mentor and mentee must enter into an agreement, approved by a governmental entity, which outlines the expectations of each party.
 - iv. Specific metrics must be identified which will be used to measure the effectiveness and success of the mentor/mentee relationship.
- e. To assist in your determination of minimum, moderate or robust, you must also compare the information provided by a Bidder in response to this question against the responses to this question submitted by all other Bidders.

6) Does your company include specific quantitative goals for the utilization of minority- and women-owned business enterprises in its non-government procurements?

- a. Points are assigned based on whether the company includes goals in its non-government procurements and the robustness of those goals and percentage of the goals attained.
- b. If the response is No or if the response is Yes but the bidder does not provide the requested information (provide a description of such non-government procurements (including time period, goal, scope and dollar amount) and indicate the percentage of the goals that were attained within the last fiscal year), a score of “none” or 0 points must be awarded.
- c. If the response is Yes, and the requested information has been provided, the robustness of the goals must be assessed by considering the following factors:
 - i. The availability of MWBEs in the industry in question. Use the New York State Contract System MWBE Directory to assist (<https://ny.newnycontracts.com>). This analysis should, to the extent possible, be based upon subcontracting activities that are available in the industry in which the company is engaged, not solely the availability of MWBE subcontractors for the instant procurement.
 - ii. The share of the goal that the company has achieved. A bidder should receive a score of “robust,” or 20 points, only if the bidder has achieved a significant portion of an appropriate goal; achieving a small percentage of an appropriate or large goal should not entitle a bidder to a robust score.
- d. To assist in your determination of minimum, moderate, or robust, you must also compare the information provided by a Bidder in response to this question against the responses to this question submitted by all other Bidders.

7) Does your company have a formal minority- and women-owned business enterprise supplier diversity program?

- a. Points are assigned based on whether the company has a formal MWBE supplier diversity program, and, if so, the robustness of that program.
- b. If the response is No or if the response is Yes but the bidder does not provide the requested information (provide a description of the supplier diversity programs, including requirements for participation, elements of the program, outreach, training and education efforts to increase participation or capacity, etc.), a score of “none” or 0 points must be awarded.
- c. If the response is Yes, and the requested information has been provided, the robustness of the program must be assessed. The bidder must document the program via a program policy manual or similar document describing the requirements for participation and elements of the program, as well as documentation of program activities in order to be awarded any points.
- d. A score of “minimum” or 2 points should be awarded where the program has weak verification procedures focused solely on creating a list of diverse suppliers from which the company may procure goods or services.
- e. A score of “robust” or 6 points should be awarded where the program is characterized by rigorous verification of MWBE status, plans for outreach to MWBE suppliers, and training and education programs designed to increase the capacity of MWBE suppliers.
- f. To assist in your determination of minimum, moderate, or robust, you must also compare the information provided by a Bidder in response to this question against the responses to this question submitted by all other Bidders.

8) Does your company plan to enter into partnering or subcontracting agreements with MWBEs to carry out your obligations under the Contract, if selected as the successful bidder?

- a. Points are assigned based on the availability of MWBEs to perform as subcontractors/suppliers on the applicable procurement and whether or not the bidder plans to use MWBEs on the applicable procurement.
- b. The OGS MWBE Office will score the responses to Question 8.
- c. For solicitations with MWBE goals, the company will be scored based on their completed Utilization Plan on Form MWBE 100.
- d. For solicitations with no MWBE goals, the company will be scored based on information collected in the Questionnaire relating to MWBEs it intends to use on the Contract if awarded. In addition, if the solicitation set no MWBE goals, and if the Bidder is awarded points during the evaluation for its response to Question 8, the Bidder must agree that, if awarded a Contract, the information the Bidder provided regarding the utilization of MWBEs on the Contract will be used to set an MWBE goal on the awarded Contract. Bidder will also be required to submit to OGS, within five business days of request, a Utilization Plan on Form MWBE 100 confirming Bidder’s agreement to make good-faith efforts in the utilization of MWBEs to meet the MWBE goal during the term of the awarded Contract. Failure to submit the Form MWBE 100 as required may delay or prevent award of the Contract.

DIVERSITY PRACTICES QUESTIONNAIRE
(DP-Questionnaire)

1) **Does your company have a Chief Diversity Officer or other individual who is tasked with supplier diversity initiatives?**

_____ No.

_____ Yes.

If yes, provide the name, title, description of duties, and evidence of initiatives performed by this individual or individuals within the last fiscal year (use additional sheets if necessary):

2) **What percentage of your company's gross revenues (from your prior fiscal year) was paid to New York State certified minority or women-owned business enterprises ("MWBEs") as subcontractors, suppliers, joint-venturers, partners or other similar arrangement, for the provision of goods or services to your company's clients or customers?**

_____ %.

Provide evidence to support this such as audited financial statements, copies of cancelled checks, certified statements from certified MWBEs confirming payment, etc.

3) **What percentage of your company's overhead (i.e., those expenditures that are not directly related to the provision of goods or services to your company's clients or customers) or non-contract-related expenses (from your prior fiscal year) was paid to MWBEs as suppliers/contractors?**

_____ %.

Provide evidence to support this such as audited financial statements, copies of cancelled checks, certified statements from certified MWBEs confirming payment, etc.

4) **Does your company provide technical training¹ to minority- or women-owned business enterprises?**

_____ No.

_____ Yes.

If yes, provide the title and description of all technical program (must relate solely to your industry), duration (hours/weeks/months), number of NYS certified MWBEs participating and

¹ Technical training is the process of teaching employees how to more accurately and thoroughly perform the technical components of their jobs. Training can include technology applications, products, sales and service tactics related specifically to their industry, and more. Technical skills are job-specific as opposed to soft skills, which are transferable.

number of persons employed by NYS certified MWBEs trained within the last fiscal year (use additional sheets if necessary):

5) Is your company participating in a government-approved minority- or women-owned business enterprise mentoring program?

No.

Yes.

If yes, provide the name, title, description of the mentoring program, including time and resource commitments, government agency involved in regulating the program, how the mentee meaningfully participates in the delivery of contract requirements, the names of all mentee organizations involved in the program within the last fiscal year as well as copies of all such mentee programs including terms, agreements, expectations and metrics for success of the mentoring program (use additional sheets if necessary):

6) Does your company include specific quantitative goals for the utilization of minority- or women-owned business enterprises in its non-government procurements?

No.

Yes.

If Yes, provide a description of such non-government procurements (including time period, goal, scope and dollar amount) and indicate the percentage of the goals that were attained within the last fiscal year.

7) Does your company have a formal minority- or women-owned business enterprise supplier diversity program?

No.

Yes.

If yes, provide a description of the supplier diversity programs including requirements for participation, elements of the program, outreach, training and education efforts by your company to increase participation or capacity of minority- and women-owned business enterprises and the names and address of such businesses and the activities conducted within the last fiscal year (use additional sheets if necessary):

8) Does your company plan to enter into partnering or subcontracting agreements with New York State certified MWBEs to carry out your obligations under the Contract, if selected as the successful bidder?

___ No.

___ Yes.

If yes, and if the Solicitation for this procurement includes MWBE goals, complete a Utilization Plan on Form MWBE 100, and submit with the Bid as required in the Solicitation. This form is available at: <http://ogs.ny.gov/MWBE/Forms.asp>

If yes, but there are no MWBE goals in the Solicitation, identify the following for **each** MWBE you plan to utilize on the awarded Contract (add additional pages if necessary):

MWBE Subcontractor/Supplier Name: _____

Name of the person you contacted within that MWBE Company: _____

MWBE address: _____

MWBE phone number: _____

MWBE email address: _____

Whether MBE or WBE (if dual certified select only one): _____

MWBE Federal Employer Identification Number: _____

Detailed description of the commercially useful work to be provided by the MWBE:

Estimated % of the value of the resulting contract work to be performed by the MWBE: _____

PLEASE NOTE: If there were no MWBE goals identified within the Solicitation and Bidder is awarded points during the evaluation for its response to Question 8, Bidder agrees that, if awarded a Contract, the information Bidder provided regarding the utilization of MWBEs on the Contract shall be used to set an MWBE goal on the awarded Contract. Bidder further agrees that it will submit to OGS, within five business days of request, a Utilization Plan on Form MWBE 100 confirming Bidder's agreement to make good-faith efforts in the utilization of MWBEs to meet that MWBE goal during the term of the awarded Contract. Failure to submit the completed Form MWBE 100 as required may delay or prevent award of a Contract.

All information provided in connection with the questionnaire is subject to audit and any fraudulent statements are subject to criminal prosecution and/or debarment in accordance with Executive Law § 316.

Signature of
Owner/Official

Printed Name of
Signatory

Title

Name of Business

Address

City, State, Zip

Date

STATE OF

COUNTY OF _____) ss:

On the _____ day of _____, 201_, before me, the undersigned, a Notary Public in and for the State of _____, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to this certification and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on this certification, the individual, or the person upon behalf of which the individual acted, executed this certification.

Notary Public

New York State Diversity Practices Scoring Matrix

Diversity Practices Scoring Matrix (DP-Matrix)

Questions							
Q1 - CDO or other person tasked with function					Yes	No	Total
					5 pts	0 pts	
Q2 - Percentage of prior yr. revenues that involved MWBEs as subs or JVs/partners	20%+	15-19%	10-14%	5-9%	1-4%	0%	
	20 pts	14 pts	10 pts	6 pts	2 pts	0pts	
Q3 - Percentage of overhead expenses paid to MWBEs	20%+	15-19%	10-14%	5-9%	1-4%	0%	
	16 pts	10 pts	7 pts	4 pts	1 pts	0pts	
Q4 - Minority- and women-owned business enterprises Training			Robust	Moderate	Minimum	None	
			16 pts	8 pts	4 pts	0 pts	
Q5 - Minority- and women-owned business enterprises Mentoring			Robust	Moderate	Minimum	None	
			12 pts	8 pts	4 pts	0 pts	
Q6 - Written minority- and women-owned business enterprises goals included in the Company's procurements			Robust	Moderate	Minimum	No	
			20 pts	12 pts	6 pts	0 pts	
Q7 - Formal Supplier Diversity Program			Robust	Moderate	Minimum	No	
			6 pts	4 pts	2 pts	0 pts	
Q8 - Utilization Plan			Robust	Moderate	Minimum	No	
			5 pts	3 pts	1 pts	0 pts	

Total Diversity Score
(Max 100 pts)

Weighted Score 5% of
Technical pts

DIVERSITY PRACTICES
(SOLICITATION TEXT)

OGS has determined, pursuant to New York State Executive Law Article 15-A, that the assessment of the diversity practices of Bidders for this procurement is practical, feasible, and appropriate. Accordingly, to receive certain evaluation points, Bidders are required to complete and submit as part of their Bid, the OGS Diversity Practices Questionnaire (Attachment [*insert number*]).

OGS will review Bidder's responses to the Diversity Practices Questionnaire (Attachment [*insert number*]), and score them according to the Diversity Practices Scoring Matrix (Attachment [*insert number*]) and in comparison to the responses of all Bidders to this Solicitation. The points received for each response will be added to achieve a Total Diversity Score of up to 100 points. The Total Diversity Score will then be weighted, to achieve a Weighted Score of 5% of the total technical score, or up to [*insert number*] points.

**Instructions for completing
the OMWBE
Goal Request for Services and Technology (Form MWBE 100-S)**

The Office of Minority- and Women-Owned Businesses and Community Relations (OMWBE) Goal Request for Services and Technology, Form MWBE 100-S, is intended for use by all OGS Divisions responsible for developing solicitations and other contracting instruments requiring MWBE goals.

Before submitting the MWBE 100-S, a preliminary assessment should be made to determine if the proposed procurement should be considered for discretionary purchase following procurement guidelines.

For each request, a separate MWBE 100-S form should be prepared.

The OMWBE is relying on the information provided in this Goal Request form for information about the procurement and MWBE participation opportunities. **Failure to present all relevant information about the procurement here will result in such information not being taken into account when MWBE goals are placed on the contract.**

Items # 1 through 14 - Provide detailed information in sections 1a – 14a in response to each request.

Item # 15(i-x) - Provide detailed information regarding the scope of work in section 14a (i-x), as requested. Attach additional sheets as needed. Provide as much detailed information as possible to present a clear and accurate description of the procurement.

Items # 16 and 17 - Provide geographic information relative to the procurement. Indicate whether geographic location might impact the contract performance.

Item #18- Provide information on federal or State restrictions, including certification, license, and/or training requirements. Indicate whether the restrictions apply to the prime and/or the subcontractor(s).

Item # 19 - Provide estimated spend amounts for the contract, as requested.

Items # 20-23 - For use by OMWBE (Designated Liaisons) only.



**MWBE GOAL REQUEST
FOR SERVICES AND TECHNOLOGY (MWBE 100-S)**

Please submit completed form to MWBE@ogs.ny.gov

SOLICITATION SPECIFICATIONS AND REQUIREMENTS:	To be completed by Division(s) Requesting Goal Establishment. (Fill in required information; space will expand as needed.)
1. Group Number, Solicitation Type (IFB, RFP, RFQ, single or sole source, etc.), and Title of Solicitation	1a.
2. Is this a B 1184 Request?	2a.
3. Program/ Business Unit Program Contact Name and Telephone #	3a.
4. Project Initiation Date (contract management activity start date)	4a.
5. Request Date (Date submitted to the MWBE Office)	5.a
6. Anticipated Solicitation Issuance (Re-issuance) Date (Advise if this has Executive Priority)	6a.
7. Is this a Best Value Procurement? (a procurement that looks at factors other than price, when selecting vendors or contractors)	7a.
8. If yes, have MWBEs held prior contracts for this type of procurement as prime contractors?	8a.
9. If the answer to question 7 is yes, have MWBEs been used in this industry as subcontractors for this type of procurement?	9a.
10. Please share any recommendation you may have about providing points to the bidders during the technical evaluation for quantitative factors or diversity practices. Provide name of the CMS 3 overseeing this procurement so the MWBE office can discuss the inclusion of points for quantitative factors or diversity practice on this solicitation	10a.
11. Is this an indefinite delivery/indefinite quantity contract(s) or is the volume of purchases under resulting contract(s) known and committed?	11a.
12. Is the solicitation for a centralized or agency-specific contract? (identify agency)	12a.
13. Anticipated Term of Contract (Provide specific month and year)	13a.
14. Is this solicitation for services or technology?	14a.
15. Scope of Work. Provide detailed responses to each of	15a.

<p>the following subparts. If the solicitation is divided into lots or regions, provide the requested information for each lot or region.</p> <ol style="list-style-type: none"> i. Provide a summary detailing the services or technology to be provided under the contract. ii. Identify any unique needs or requirements for the contract services or technology. iii. Describe any supplies that contractor(s) may purchase from NYS Certified MWBEs to assist in providing the services or technology. iv. Explain if and how the supplies identified above can be directly tracked to the final services or technology provided under the contract. v. Describe industry practice for the use of subcontractors in fulfilling contract requirements. vi. Describe specific tasks subcontractors may perform under the contract. vii. Explain if the industry relies on resellers and, if so, describe the value added by resellers in transactions. viii. Identify any resources (including, but not limited to, websites) used to perform market analysis or identify categories of potential subcontractors. <p>Attach additional sheets to describe all potential areas of, or impediments to, subcontracting, supply, and/or delivery opportunities.</p>	<ol style="list-style-type: none"> i. ii. iii. iv. v. vi. vii.
<p>16. Geographic Location of Contract Performance. Include whether consideration has been given to a county or regional approach to allow for potential subcontracting opportunities.</p>	16a.
<p>17. Geographic Limitation. Explain the extent to which geography is material to the performance of the contract.</p>	17a.
<p>18. Restrictions. Include any State or federal certification, license, and/or training requirements that are required in the industry and would potentially prevent or impede the use of subcontractors to assist in providing contract services or technology.</p>	18a.
<p>19. Estimated Spend (Identify State and Non-State Spend by percentage and dollar amount.)</p>	19a.
<p><u>DO NOT WRITE BELOW THIS LINE (FOR OMWBE USE ONLY)</u></p>	
<p>20. OMWBE COMMENTS AND RECOMMENDATIONS:</p>	<p>21. GOAL RECOMMENDATIONS</p> <p><u>MBE GOAL:</u> _____ %</p> <p><u>WBE GOAL:</u> _____ %</p> <p>_____ Quantitative Factor (3 pts)</p> <p>_____ Diversity Practices (3 pts)</p>
<p>22. OMWBE PROGRAM LIAISON, DIVISION, CONTACT INFORMATION, INCLUDING TELEPHONE #:</p>	<p>23. OMWBE PROGRAM GOAL ESTABLISHMENT DATE:</p>

[Please note that before including the below text in a solicitation or contract, you must determine whether the 30% overall goal for participation of minority- and women-owned business enterprises should be revised to more closely reflect the findings of the disparity study, which found the overall availability of minority- and women-owned business enterprises in the market place to be approximately 30%, and you must delete this note! In order for goals under 30% to be placed on a contract, a waiver must first be obtained from the MWBE office.]

CONTRACTOR REQUIREMENTS AND PROCEDURES FOR PARTICIPATION BY NEW YORK STATE CERTIFIED MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND WOMEN

I. New York State Law

Pursuant to New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations (“NYCRR”), the New York State Office of General Services (“OGS”) is required to promote opportunities for the maximum feasible participation of New York State-certified Minority- and Women-owned Business Enterprises (“MWBEs”) and the employment of minority group members and women in the performance of OGS contracts.

II. General Provisions

- A. OGS is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 140-145 (“MWBE Regulations”) for all State contracts as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The Contractor agrees, in addition to any other nondiscrimination provision of the Contract, and at no additional cost to OGS, to fully comply and cooperate with OGS in the implementation of New York State Executive Law Article 15-A and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for MWBEs. Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) or other applicable federal, State, or local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, a finding of non-responsibility, breach of contract, withholding of funds, liquidated damages pursuant to clause IX of this section, and/or enforcement proceedings as allowed by the Contract and applicable law.

III. Equal Employment Opportunity (EEO)

- A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to all Contractors, and any subcontractors, awarded a subcontract over \$25,000 for labor, services, including legal, financial and other professional services, travel, supplies,

equipment, materials, or any combination of the foregoing, to be performed for, or rendered or furnished to, the contracting State agency (the "Work") except where the Work is for the beneficial use of the Contractor.

1. Contractor and subcontractors shall undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, or marital status. For these purposes, EEO shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, and rates of pay or other forms of compensation. This requirement does not apply to: (i) the performance of work or the provision of services or any other activity that is unrelated, separate, or distinct from the Contract; or (ii) employment outside New York State.
2. By entering into this Contract, Contractor certifies that the text set forth in clause 12 of Appendix A, attached hereto and made a part hereof, is Contractor's equal employment opportunity policy. In addition, Contractor agrees to comply with the Non-Discrimination Requirements set forth in clause 5 of Appendix A.

- B. Form EEO 100 - Staffing Plan [Staffing Plans are only required if the Contract has a value in excess of \$250,000.00. If less than \$250,000.00 remove the below text and replace with "RESERVED" *and you must delete this note!*]

To ensure compliance with this section, the Contractor agrees to submit, or has submitted with the Bid, a staffing plan on Form EEO 100 to OGS to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and federal occupational categories.

- C. Form EEO 101 - Workforce Utilization Reporting Form (Commodities and Services) ("Form EEO-101-Commodities and Services")

1. The Contractor shall submit, and shall require each of its subcontractors to submit, a Form EEO-101-Commodities and Services to OGS to report the actual workforce utilized in the performance of the Contract by the specified categories listed including ethnic background, gender, and Federal occupational categories. The Form EEO-101-Commodities and Services must be submitted electronically to OGS at EEO_CentCon@ogs.ny.gov on a quarterly basis during the term of the Contract by the 10th day of April, July, October, and January.
2. Separate forms shall be completed by Contractor and all subcontractors.
3. In limited instances, the Contractor or subcontractor may not be able to separate out the workforce utilized in the performance of the Contract from its total workforce. When a separation can be made, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided relates to the actual workforce utilized on the Contract. When the workforce to be utilized on the Contract cannot be separated out from the Contractor's or subcontractor's total workforce, the Contractor or subcontractor shall submit the Form EEO-101-Commodities and Services and indicate that the information provided is the Contractor's or subcontractor's total workforce during the subject time frame, not limited to work specifically performed under the Contract.

- D. Contractor shall comply with the provisions of the Human Rights Law and all other State and federal statutory and constitutional non-discrimination provisions. Contractor and subcontractors shall not discriminate against any employee or applicant for employment because of race, creed

(religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status, or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

IV. Contract Goals

- A. OGS hereby establishes an overall goal of ___% for MWBE participation, ___% for Minority-Owned Business Enterprises (“MBE”) participation and ___% for Women-Owned Business Enterprises (“WBE”) participation (based on the current availability of MBEs and WBEs). The total Contract goal can be obtained by utilizing any combination of MBE and/or WBE participation for subcontracting and supplies acquired under the Contract.
- B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract goals established in clause IV-A hereof, Contractor should reference the directory of New York State Certified MWBEs found at the following internet address: <https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp?TN=ny&XID=2528>. The MWBE Regulations are located at 5 NYCRR §§ 140 – 145. Questions regarding compliance with MWBE participation goals should be directed to the Designated Contacts within the OGS Office of Minority- and Women-Owned Business Enterprises. Additionally, following Contract execution, Contractor is encouraged to contact the Division of Minority and Women’s Business Development ((518) 292-5250; (212) 803-2414; or (716) 846-8200) to discuss additional methods of maximizing participation by MWBEs on the Contract.
- C. Contractor must document “good faith efforts” to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract (see clause VII below).

V. MWBE Utilization Plan

- A. In accordance with 5 NYCRR § 142.4, Bidders are required to submit a completed Utilization Plan on Form MWBE 100 with their bid.
- B. The Utilization Plan shall list the MWBEs the Bidder intends to use to perform the Contract, a description of the Contract scope of work the Bidder intends the MWBE to perform to meet the goals on the Contract, and the estimated or, if known, actual dollar amounts to be paid to an MWBE. By signing the Utilization Plan, the Bidder acknowledges that making false representations or including information evidencing a lack of good faith as part of, or in conjunction with, the submission of a Utilization Plan is prohibited by law and may result in penalties including, but not limited to, termination of a contract for cause, loss of eligibility to submit future bids, and/or withholding of payments. Any modifications or changes to the agreed participation by New York State Certified MWBEs after the Contract award and during the term of the Contract must be reported on a revised MWBE Utilization Plan and submitted to OGS.
- C. By entering into the Contract, Bidder/Contractor understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. When an MWBE is serving as a broker on the Contract, only 25 percent of all sums paid to a broker shall be deemed to represent the commercially useful function performed by the MWBE.

- D. OGS will review the submitted MWBE Utilization Plan and advise the Bidder of OGS acceptance or issue a notice of deficiency within 30 days of receipt.
- E. If a notice of deficiency is issued; Bidder agrees that it shall respond to the notice of deficiency, within seven (7) business days of receipt, by submitting to OGS a written remedy in response to the notice of deficiency. If the written remedy that is submitted is not timely or is found by OGS to be inadequate, OGS shall notify the Bidder and direct the Bidder to submit, within five (5) business days of notification by OGS, a request for a partial or total waiver of MWBE participation goals on Form BDC 333. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid or proposal.
- F. OGS may disqualify a Bidder's bid/proposal as being non-responsive under the following circumstances:
 - (a) If a Bidder fails to submit an MWBE Utilization Plan;
 - (b) If a Bidder fails to submit a written remedy to a notice of deficiency;
 - (c) If a Bidder fails to submit a request for waiver; or
 - (d) If OGS determines that the Bidder has failed to document good faith efforts.
- G. If awarded a Contract, Contractor certifies that it will follow the submitted MWBE Utilization Plan for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in clause IV-A of this Section.
- H. Bidder/Contractor further agrees that a failure to submit and/or use such completed MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, OGS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.

VI. Request for Waiver

- A. **Prior to submission of a request for a partial or total waiver, Bidder/Contractor shall speak to the Designated Contacts of the OGS Office of Minority- and Women-Owned Business Enterprises for guidance.**
- B. In accordance with 5 NYCRR § 142.7, a Bidder/Contractor who is able to document good faith efforts to meet the goal requirements, as set forth in clause VII below, may submit a request for a partial or total waiver on Form BDC 333, accompanied by supporting documentation. A Bidder may submit the request for waiver at the same time it submits its MWBE Utilization Plan. If a request for waiver is submitted with the MWBE Utilization Plan and is not accepted by OGS at that time, the provisions of clauses V(C), (D) & (E) will apply. If the documentation included with the Bidder's/Contractor's waiver request is complete, OGS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) business days of receipt.
- C. Contractor shall attempt to utilize, in good faith, any MBE or WBE identified within its MWBE Utilization Plan, during the performance of the Contract. Requests for a partial or total waiver of established goal requirements made subsequent to Contract award may be made at any time during

the term of the Contract to OGS, but must be made no later than prior to the submission of a request for final payment on the Contract.

- D. If OGS, upon review of the MWBE Utilization Plan and Monthly MWBE Contractor Compliance Reports, determines that Contractor is failing or refusing to comply with the contract goals and no waiver has been issued in regards to such non-compliance, OGS may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE contract goals.

VII. Required Good Faith Efforts

In accordance with 5 NYCRR § 142.8, Contractors must document their good faith efforts toward utilizing MWBEs on the Contract. Evidence of required good faith efforts shall include, but not be limited to, the following:

1. A list of the general circulation, trade, and MWBE-oriented publications and dates of publications in which the Contractor solicited the participation of certified MWBEs as subcontractors/suppliers, copies of such solicitations, and any responses thereto.
2. A list of the certified MWBEs appearing in the Empire State Development (“ESD”) MWBE directory that were solicited for this Contract. Provide proof of dates or copies of the solicitations and copies of the responses made by the certified MWBEs. Describe specific reasons that responding certified MWBEs were not selected.
3. Descriptions of the Contract documents/plans/specifications made available to certified MWBEs by the Contractor when soliciting their participation and steps taken to structure the scope of work for the purpose of subcontracting with, or obtaining supplies from, certified MWBEs.
4. A description of the negotiations between the Contractor and certified MWBEs for the purposes of complying with the MWBE goals of this Contract.
5. Dates of any pre-bid, pre-award, or other meetings attended by Contractor, if any, scheduled by OGS with certified MWBEs whom OGS determined were capable of fulfilling the MWBE goals set in the Contract.
6. Other information deemed relevant to the request.

VIII. Monthly MWBE Contractor Compliance Report

- A. In accordance with 5 NYCRR § 142.10, Contractor is required to report Monthly MWBE Contractor Compliance to OGS during the term of the Contract for the preceding month’s activity, documenting progress made towards achievement of the Contract MWBE goals. OGS requests that all Contractors use the New York State Contract System (“NYSCS”) to report subcontractor and supplier payments made by Contractor to MWBEs performing work under the Contract. The NYSCS may be accessed at <https://ny.newnycontracts.com/>. This is a New York State-based system that all State agencies and authorities will be implementing to ensure uniform contract compliance reporting throughout New York State.
- B. When a Contractor receives a payment from a State agency, it is the Contractor’s responsibility to pay its subcontractors and suppliers in a timely manner. On or after the first day of each month, the Contractor will receive an email or fax notification (“audit notice”) indicating that a

representative of its company needs to log-in to the NYSCS to report the company's MWBE subcontractor and supplier payments for the preceding month. The Contractor must also report when no payments have been made to a subcontractor or supplier in a particular month with entry of a zero dollar value in the NYSCS. Once subcontractor and supplier payments have been entered into the NYSCS, the subcontractor(s) and supplier(s) will receive an email or fax notification advising them to log into the NYSCS to confirm that they actually received the reported payments from the Contractor. It is the Contractor's responsibility to educate its MWBE subcontractors and suppliers about the NYSCS and the need to confirm payments made to them in the NYSCS.

- C. To assist in the use of the NYSCS, OGS recommends that all Contractors and MWBE subcontractors and suppliers sign up for the following two webinar trainings offered through the NYSCS: **"Introduction to the System – Vendor training"** and **"Contract Compliance Reporting - Vendor Training"** to become familiar with the NYSCS. To view the training schedule and to register visit: <https://ny.newnycontracts.com/events.asp>
- D. As soon as possible after the Contract is approved, Contractor should visit <https://ny.newnycontracts.com> and click on **"Account Lookup"** to identify the Contractor's account by company name. Contact information should be reviewed and updated if necessary by choosing **"Change Info."** It is important that the staff member who is responsible for reporting payment information for the Contractor be listed as a user in the NYSCS. Users who are not already listed may be added through **"Request New User."** When identifying the person responsible, please add **"- MWBE Contact"** after his or her last name (i.e., John Doe – MWBE Contact) to ensure that the correct person receives audit notices from the NYSCS. NYSCS Technical Support should be contacted for any technical support questions by clicking on the links for **"Contact Us & Support"** then **"Technical Support"** on the NYSCS website.
- E. If Contractor is unable to report MWBE Contractor Compliance via the NYSCS, Contractor must submit a Monthly MWBE Contractor Compliance Report on Form MWBE 102 to OGS, by the 10th day of each month during the term of the Contract, for the preceding month's activity to: OGS MWBE Office, 29th Floor Corning Tower, Empire State Plaza, Albany, NY 12242. Phone: 518-486-9284; Fax: 518-486-9285.
- F. It is the Contractor's responsibility to report subcontractor and supplier payments. Failure to respond to payment audits in a timely fashion through the NYSCS, or by paper to OGS, may jeopardize future payments pursuant to the MWBE liquidated damages provisions in clause IX below.

IX. Breach of Contract and Liquidated Damages

- A. Where OGS determines that the Contractor is not in compliance with the requirements of this Contract, and the Contractor refuses to comply with such requirements, or if it is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, the Contractor shall be obligated to pay liquidated damages to OGS.
- B. Such liquidated damages shall be calculated as an amount equaling the difference between:

1. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
 2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
- C. If OGS determines that Contractor is liable for liquidated damages and such identified sums have not been withheld by OGS, Contractor shall pay such liquidated damages to OGS within sixty (60) days after they are assessed. Provided, however, that if the Contractor has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to 5 NYCRR § 142.12, liquidated damages shall be payable only in the event of a determination adverse to the Contractor following the complaint process.

X. Fraud

Any suspicion of fraud, waste, or abuse involving the contracting or certification of MWBEs shall be immediately reported to ESD's Division of Minority and Women's Business Development at (855) 373-4692.

ALL FORMS ARE AVAILABLE AT: <http://www.ogs.ny.gov/MWBE/Forms.asp>

October 2016 – Non-Construction – Goals