

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

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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.