

## Appendix M/WBE

### **Participation by Minority Group Members and Women with Respect to State Contracts: Requirements and Procedures**

Revised May 2015

#### **I. General Provisions**

- a. The Office of Children and Family Services ("OCFS") is required to implement the provisions of New York State Executive Law Article 15-A and 5 NYCRR Parts 142-144 ("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 to the subject Contract (the "Contractor" and the "Contract," respectively) agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the New York State OCFS, to fully comply and cooperate with OCFS in the implementation of New York State Executive Law Article 15-A. These requirements include equal employment opportunities for minority group members and women ("EEO") and contracting opportunities for New York State Certified Minority and Women-Owned Business Enterprises ("MWBE"). 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. 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.
- d. **Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the withholding of funds or such other actions, liquidated damages pursuant to Section VIII of this Appendix, or enforcement proceedings as allowed by the Contract.**

#### **II. Contract Goals**

- a. For purposes of this Contract, OCFS hereby establishes an overall goal of 30% for MWBE participation. OCFS recommends that, whenever practicable, its contractors attempt to equally utilize Minority-Owned Business Enterprises ("MBE") and Women-Owned Business Enterprises ("WBE") participation in the performance of the contract. It is however important to note that strict adherence to the suggested MBE and WBE utilization is not mandatory as long as the overall 30% goal is met.
- b. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the Contract Goals established in Section II.a. hereof, Contractor should reference the directory of New York State Certified MBWEs found at the following internet address:  
<https://ny.newnycontracts.com>

Additionally, Contractor is encouraged to contact the Division of Minority and Woman Business Development (DMWBD) to discuss additional methods of maximizing participation by MWBEs on the Contract. DMWBD contact numbers: (518) 292-5250; (212) 803-2414; or (716) 846-8200).

- c. Where MWBE goals have been established herein, pursuant to 5 NYCRR §142.8, Contractor must document "good faith efforts" to provide meaningful participation by MWBEs as subcontractors or suppliers in the performance of the Contract. **In accordance with Section**

**316-a of Article 15-A and 5 NYCRR §142.13, the Contractor acknowledges that if Contractor is found to have willfully and intentionally failed to comply with the MWBE participation goals set forth in the Contract, such a finding constitutes a breach of contract and the Contractor shall be liable to OCFS for liquidated or other appropriate damages, as set forth herein.**

### **III. Equal Employment Opportunity (EEO)**

#### [OCFS-3460 – M/WBE – Equal Employment Opportunity Policy Statement](#)

- a. Contractor agrees to be bound by and comply with the provisions of Article 15-A and the MWBE Regulations promulgated by the DMWBD. If any of these terms or provisions conflict with applicable law or regulations, such laws and regulations shall supersede these requirements.

Contractor shall comply with the following provisions of Article 15-A:

- b. Contractor and Subcontractors shall undertake or continue existing Equal Employment Opportunity (EEO) programs to ensure that minority group members and women are afforded employment opportunities without discrimination 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. 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.
- c. The Contractor shall submit an EEO Policy Statement to OCFS within 10 (ten) business days after the notice of award by OCFS to the Contractor. Completed forms should be sent via email to [mwbeinfo@ocfs.ny.gov](mailto:mwbeinfo@ocfs.ny.gov). The Contract Management System (CMS) is the official record of system used for developing and tracking OCFS Contracts. **Please do not upload MWBE forms to the Contract Management System (CMS).**
- d. If Contractor or Subcontractor does not have an existing EEO Policy Statement or lacks an appropriate EEO Policy Statement as required pursuant to Article 15-A of the NYS Executive Law, OCFS may provide form [OCFS-3460 – M/WBE – Equal Employment Opportunity Policy Statement](#) as a model. The Contractor/Subcontractor has the option to use this form or create an appropriate EEO Policy Statement to be submitted to OCFS for approval.
- e. The Contractor's EEO Policy Statement shall include the following language:
  - i. The Contractor and/or Subcontractor will 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; will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
  - ii. The Contractor and/or Subcontractor shall state in all solicitations or advertisements for employees that, in the performance of the contract, all qualified applicants will be afforded equal employment opportunities without discrimination 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.
  - iii. The Contractor and/or Subcontractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other

agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate on the basis 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; and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein.

- iv. The 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 Subcontractor 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.
- v. The Contractor and/or Subcontractor will include the above-noted language provisions outlined in numbers i. through iv., which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements in the language will be binding upon each subcontractor as to work in connection with the Contract.

#### IV. Project Staffing Plan Form

##### [OCFS-4629 - Project Staffing Plan Form](#)

- a. To ensure compliance with the Equal Employment Opportunity (EEO) Section above, the Contractor shall submit a Project Staffing Plan 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. Completed forms should be sent via email to [mwbeinfo@ocfs.ny.gov](mailto:mwbeinfo@ocfs.ny.gov). **Please do not upload MWBE forms to CMS.**
- b. Once a contract has been awarded, and during the term of Contract, Contractor will, on a quarterly basis, submit to OCFS any modifications or changes to the Project Staffing Plan Form. The Contractor's Project Staffing Plan Form will only include workforce data for staff utilized on the prime contract, and should not include data on staff performing work under any subcontracts. In limited instances, Contractor may not be able to separate out the workforce utilized in the performance of the Contract from Contractor's and/or subcontractor's total workforce. When a separation can be made, Contractor shall submit the Project Staffing Form and indicate that the information provided related to the actual workforce utilized on the Contract. When the workforce to be utilized on the contract cannot be separated out from Contractor's and/or subcontractor's total workforce, Contractor shall submit the Project Staffing Form and indicate that the information provided is Contractor's total workforce during the subject time frame, not limited to work specifically under the contract.

#### V. Subcontracting/Suppliers Utilization Form

##### [OCFS-4631 – Subcontracting/Suppliers Utilization Form](#)

- a. The Contractor represents and warrants that Contractor will submit a Subcontracting/Supplier Utilization Form no later than 7 days after approval of the contract. Completed forms should be sent via email to [mwbeinfo@ocfs.ny.gov](mailto:mwbeinfo@ocfs.ny.gov). **Please do not upload MWBE forms to CMS.**
- b. If at the time of submission of the OCFS-4631 appropriate New York State Certified MWBE have not been identified, the Contractor should enter "to be determined" (TBD). Within 30 calendar days of the contract approval, the Contractor must identify appropriate New York State Certified firms to be utilized, and provide this information using the OCFS-4631 Subcontracting/Suppliers Utilization Form.

- c. Contractor agrees to use such Subcontracting/Supplier Utilization Form for the performance of MWBEs on the Contract pursuant to the prescribed MWBE goals set forth in Section II.a. of this Appendix.
- d. **Contractor further agrees that failure to submit and/or use such Subcontracting/Suppliers Utilization Form may constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, OCFS shall be entitled to any remedy provided herein, including but not limited to, a finding of Contractor non-responsiveness.**

## **VI. M/WBE Subcontractors & Suppliers Letter of Intent to Participate Forms**

### [OCFS-4630 - Subcontractors and Suppliers Letter of Intent to Participate Form](#)

The OCFS-4630 Subcontractor and Suppliers Letter of Intent to Participate Form is to be completed by the proposed M/WBE Subcontractor/Supplier during the contract development stage. There should be one form for each of the NYS Certified M/WBE vendors you propose to utilize as subcontractors, service providers or suppliers on the OCFS-4631 Subcontracting/Suppliers Utilization Form. If the MBE or WBE proposed for a portion of this Contract is part of a joint venture or other temporarily-formed business arrangement, the name and address of the joint venture or the temporarily formed business entity should be indicated. Completed forms should be sent via email to [mwbeinfo@ocfs.ny.gov](mailto:mwbeinfo@ocfs.ny.gov). **Please do not upload MWBE forms to CMS.**

## **VII. Waivers**

### [OCFS-4442 - M/WBE Request for Waiver Form](#)

Waiver Requests are submitted only at the request of OCFS using the OCFS-4442, M/WBE Request for Waiver Form.

- a. If the Contractor, after making good faith efforts, is unable to comply with M/WBE goals, an OCFS-4442 M/WBE Request for Waiver Form may be submitted, under direction of OCFS, documenting any good faith efforts made to meet such goals. If the documentation included with the waiver request is complete, OCFS shall evaluate the request and issue a written notice of acceptance or denial within twenty (20) days of receipt.
- b. If OCFS, upon review of the OCFS-4631 Subcontracting/Suppliers Utilization Form and updated OCFS-4441 MWBE Quarterly 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, OCFS 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 second request for partial or total waiver of MWBE Contract Goals with additional information/justification.
- c. Once OCFS has finalized its decision regarding the waiver request, the request, along with all accompanying documentation, will be forwarded to the Governor's Chief Diversity Office for final determination.

## **VIII. M/WBE Quarterly Report**

### [OCFS-4441 - M/WBE Quarterly Report Form](#)

Contractor is required to submit an MWBE Quarterly Report to OCFS within 30 days following the end of each applicable reporting quarter over the term of the Contract, documenting the progress made towards achievement of the MWBE goals. Completed forms should be sent via email to [mwbeinfo@ocfs.ny.gov](mailto:mwbeinfo@ocfs.ny.gov). **Please do not upload MWBE forms to CMS.**

## IX. Liquidated Damages - MWBE Participation

- a. Where OCFS determines that the Contractor is not in compliance with the requirements of the Contract concerning participation by minority and women-owned business enterprises, and that such failure to comply was willful and intentional, or that Contractor refused to comply with such requirements after being notified by OCFS of non-compliance with such requirements, Contractor shall be obligated to pay liquidated damages to OCFS.
- b. Such liquidated damages shall be calculated up to **the** amount equaling the difference between:
  - i. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
  - ii. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
- c. In the event a determination has been made which requires the Contractor to pay liquidated damages and the identified sums of liquidated damages has not been withheld by the OCFS from any payments due to the Contractor, the Contractor shall pay such liquidated damages as have not been withheld to the OCFS within sixty (60) days after the Contractor is notified by the OCFS that the Contractor is required to pay such damages unless, prior to the end of the sixtieth day, the Contractor has filed a complaint with the Director of the Division of Minority and Woman Business Development (Director) pursuant to Subdivision 8 of Section 313 of the Executive Law in which event the liquidated damages shall be payable within 30 days after issuance of Director's decision if the Director renders a decision in favor of the OCFS.