
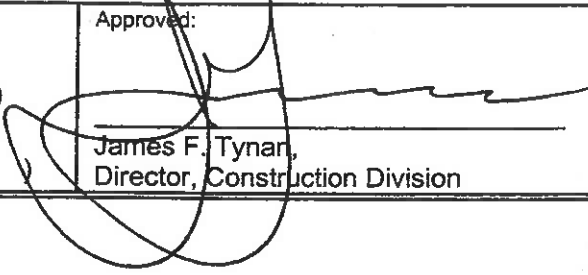


To: SUPERSEDED BY <i>EI 05-005</i> <i>EFFECTIVE 05/05/05</i>		New York State Department of Transportation ENGINEERING INSTRUCTION	EI 02-013
Title: Revisions to Section 100 of the Standard Specifications - §102-21 & §102-22			
Distribution: <input checked="" type="checkbox"/> Manufacturers (18) <input checked="" type="checkbox"/> Main Office (30) <input checked="" type="checkbox"/> Local Govt. (31) <input checked="" type="checkbox"/> Regions/Agencies (32)	Approved:  _____ James F. Tynan, Director, Construction Division	<input checked="" type="checkbox"/> Surveyors (33) <input checked="" type="checkbox"/> Consultants (34) <input checked="" type="checkbox"/> Contractors (39) <input type="checkbox"/> _____ () _____ Date <i>6-13-02</i>	

ADMINISTRATIVE INFORMATION:

- This EI is effective with projects submitted for the letting of 9/12/02.
- This EI supersedes §102-22, *DBE Utilization* issued by EI 01-018.
- The issued materials will be included in the next Addendum to the Standard Specifications of January 2, 2002.

PURPOSE: To issue revised Standard Specifications 102-21 and 102-22.

TECHNICAL INFORMATION The revised Standard Specifications account for changes in Federal DBE regulations and editorial/typographical corrections.

IMPLEMENTATION: The attached revisions to Section 100 will be included as a shelf note to contract proposals by Main Office DQAB for all contracts beginning with those submitted for the letting of 9/12/02.

TRANSMITTED MATERIALS: Shelf Notes to implement the following specification changes.

- §102-21, M/WBE Utilization.
- §102-22, DBE Utilization.

BACKGROUND: The Department is involved in a continuous improvement effort to clarify our specifications. This effort began with the adoption of Addendum No. 1 to the Standard Specifications of January 2, 1995. This issuance is a continuation of that effort.

CONTACT: Direct questions regarding this issuance to Brian DeWald of the Construction Division at 518-457-6472 or via e-mail at BDeWald@gw.dot.state.ny.us.

Make the following changes to the Standard Specifications dated January 2, 2002:
Volume I, Page 1-37, Delete §102-21 and §102-22 and Replace them with the following:

102-21 MINORITY/WOMEN'S BUSINESS ENTERPRISE (M/WBE) UTILIZATION. The Department seeks to achieve the following:

- To ensure nondiscrimination in award and administration of Department contracts;
- To ensure that only firms that fully meet M/WBE eligibility standards are permitted to participate in the Department's M/WBE program;
- To help remove barriers to the participation of M/WBEs in the performance of Department contracts;
- To create a level playing field on which M/WBEs can fairly compete for Department contracts; and
- To assist in the development of firms that can compete successfully in the construction industry outside the M/WBE program.

The parties to this contract shall take all necessary and reasonable steps in accordance with the laws, rules and regulations cited in this subsection to promote the objectives outlined above. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of Department contracts. This policy shall be made a part of all subcontracts and agreements entered into as a result of this contract.

New York State, to this end, has enacted Section 85 of the Highway Law, Section 428 of the Transportation Law, and Executive Law Article 15A, and regulations have been promulgated under 5 NYCRR 140. The parties to this contract shall comply with these laws, rules and regulations and the following M/WBE Program requirements:

GENERAL PROVISIONS

A. Goals

1. Established Goals. The Department may have established contract utilization goals for M/WBEs, which are expressed as a percentage of the total contract price. The goals are stated in the proposal and remain in effect throughout the life of the contract. In executing the contract or bid documents the Bidder declares that it subscribes to the utilization goals and shall meet the goals or demonstrate that it could not meet them despite its best efforts. Failure to meet the established goals for the contract and failure to meet the good faith efforts, as defined in paragraph E, may be grounds for rejection of the bid as non-responsive. When the contract is awarded with M/WBE participation that is less than the contract goals, the Contractor shall continue good faith efforts, as defined in paragraph E, throughout the life of the contract.

2. Zero Percent Goals. When the Department has established zero goals for participation by M/WBEs and the Bidder proposes the use of a subcontractor or the purchase of goods from a material supplier at any time during the life of the contract, the Contractor agrees to promote the objectives outlined in this subsection by providing opportunities for M/WBEs to participate in these areas, with such participation to be credited towards the race-neutral component of the Department's M/WBE Program.

B. Counting M/WBE Participation Towards the M/WBE Goals. The value of work actually performed by the M/WBE will be counted toward the goals in the amounts set forth below. The cost of supplies purchased or materials obtained by the M/WBE, except for supplies purchased or equipment leased from the Contractor, other subcontractors on the contract, or their affiliates, will also be counted. The proposed utilization must be considered to be a commercially useful function, as defined in paragraph C(1). If the Department determines that some or all of the M/WBE's work does not constitute a commercially useful function, only the portion of the work considered to be a commercially useful function will be credited toward the goals. The M/WBE may rebut a determination by the Department that the M/WBE is not performing a commercially useful function to the Empire State Development Corporation (ESDC). An M/WBE that holds a Department contract may not count its own utilization in the contract toward the M/WBE contract goals.

M/WBE participation shall be counted toward meeting the M/WBE goals in accordance with the following:

1. Eligibility. Only those M/WBE firms that are certified by ESDC are eligible to be used for goal attainment on this contract. An M/WBE must be certified on the day the contract is let. M/WBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as an M/WBE.

2. Subcontracting. The total agreed value of work to be performed by the M/WBE's own forces is counted toward the M/WBE goals, except as provided in numbers 3 through 6 below.

3. Joint Ventures. The total dollar value of the contract equal to the distinct, clearly defined portion of the work in the contract that the M/WBE performs with its own equipment, and with its own forces under its own supervision will be counted toward the M/WBE contract goals, subject to approval by the Department of the joint venture agreement to be furnished by the Bidder before award of the contract. The joint venture agreement shall include a detailed breakdown of the following:

- a. Contract responsibility of the M/WBE for specific contract items of work;
- b. Capital participation by the M/WBE;
- c. Specific equipment to be provided to the joint venture by the M/WBE;
- d. Specific responsibilities of the M/WBE in the control of the joint venture;
- e. Specific staffing and skills to be provided to the joint venture by the M/WBE; and
- f. Percentage distribution to the M/WBE of the projected profit or loss incurred by the joint venture.

In addition to these requirements, the M/WBE joint venture must perform a commercially useful function as an M/WBE as defined in paragraph (C)(1).

4. Manufacturers, Fabricators and Material Suppliers. Expenditures for materials and supplies obtained from M/WBE Manufacturers, Fabricators and Material Suppliers in the amounts noted below will be counted toward the M/WBE goals. The M/WBE Manufacturer, Fabricator or Material Supplier shall assume the actual and contractual responsibility for the provision of the materials and supplies.

- a. Count the entire expenditure to an M/WBE Manufacturer or Fabricator.
- b. Count 60% (sixty percent) of the expenditure to an M/WBE Material Supplier. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not Material Suppliers within the meaning of this paragraph.
- c. With respect to materials or supplies purchased from an M/WBE which is neither a Manufacturer nor a Fabricator nor a Material Supplier, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees for transportation charges for the delivery of materials or supplies required on a project site toward the M/WBE goals, provided they are determined by the Department to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves are not counted.
- d. The Bidder shall indicate in the form of an explanation on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, the specification section number(s) (3 digits) of the material to be supplied, manufactured, fabricated, or otherwise provided.

5. Trucking Operations. Count toward the M/WBE goals the expenditure for trucking provided by certified M/WBEs in accordance with the following:

- a. To satisfy the criterion of performing a commercially useful function, an M/WBE shall own and operate at least one registered, insured, and fully operational truck used on the contract and shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the M/WBE goals.
- b. The M/WBE receives credit for 100% of the value of the trucking operations it provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the M/WBE using drivers it employs.
- c. The M/WBE may lease trucks on a short-term basis from another M/WBE, including an owner-operator who is certified as an M/WBE. The M/WBE who leases trucks from another M/WBE receives credit for 100% of the value of the trucking operations that the lessee M/WBE provides on the contract.
- d. The M/WBE may lease trucks on a short-term basis from a non-M/WBE, including an owner-operator. The M/WBE who leases trucks from a non-M/WBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The M/WBE does not receive credit for the value of the trucking operations provided by the lessee, because these services are not provided by an M/WBE.
- e. The Bidder shall provide the following with the utilization package as described in paragraph F:
 1. Copies of all lease agreements utilized by the M/WBE; and
 2. Calculations and any pertinent documentation that support the dollar value of the proposed M/WBE trucking operations; e.g., method of payment (hour, ton or load hauled), the number of trucks required to perform the trucking operations listed on the Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, and the duration of the trucking operations to be performed.

f. The Bidder shall indicate in the form of an explanation on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, the Specification section number(s) (3 digits) for which the trucking operations are to be performed, they type of trucking operation to be performed (i.e., on-site vs. off-site), and the corresponding dollar value for those operations, per item.

In accordance with 29 CFR 5.2(1), "site of the work" is defined as the physical place or places where the construction called for in the contract will remain when work on it has been completed. Facilities such as fabrication plants, mobile factories, batch plants, borrow pits, etc. are part of the work site provided that they are dedicated exclusively to the performance of the contract. Not included in the site of the work are facilities whose continuance in operation are determined wholly without regard to a particular contract. Such permanent, previously established facilities are not a part of the "site of work," even where the operations for a period of time may be dedicated exclusively, to the performance of a contract.

g. The M/WBE trucking firm of record is the firm that is listed on the Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet. The M/WBE trucking firm of record must control the day-to-day trucking operations on the project, and is responsible for:

1. Negotiating and executing rental/leasing agreements;
2. Hiring and firing the work force;
3. Coordinating the daily trucking needs with the Contractor; and
4. Scheduling and dispatching trucks.

6. Partial Items. The Bidder shall explain in the writing the scope of work to be performed by the M/WBE for all items indicated as partial items on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet at the time the Bidder submits the Utilization Package.

7. Other. Count the entire amount of fees or commissions charged by an M/WBE for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

C. Conditions of Participation. M/WBE participation will be counted toward meeting the M/WBE contract goals, subject to all of the following conditions:

1. Commercially Useful Function. An M/WBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of work on a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved in accordance with normal industry practice. Regardless of whether an arrangement between the Contractor and the M/WBE represent standard industry practice, if the arrangement erodes the ownership, control or independence of the M/WBE or in any other way does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the goals and may be required to backfill the participation in accordance with paragraph I. An M/WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of M/WBE participation.

2. Work Force. The M/WBE must employ a work force, (including administrative and clerical) separate and apart from that employed by the Contractor, other subcontractors on the project, or their affiliates. This does not preclude the employment by the M/WBE of an individual that has been previously employed by another firm involved in the contract, provided that the individual was independently recruited by the M/WBE in accordance with customary industry practice. The routine transfer of work crews from another employer to the M/WBE shall not be allowed.

3. Supervision. All work performed by the M/WBE must be controlled and supervised by the M/WBE without duplication of supervisory personnel from the Contractor, other subcontractors on the project, or their affiliates. This does not preclude routine communication between the supervisory personnel of the M/WBE and other supervisors necessary to coordinate the work of the contract.

4. Equipment. M/WBE subcontractors may supplement their equipment by renting or leasing additional equipment in accordance with customary industry practice. However, no more than 50% of the equipment required to perform the work of the subcontractor may be obtained from the Contractor, other subcontractors on the project, or their affiliates. If the M/WBE obtains equipment from any of those sources, the M/WBE shall provide documentation to the Department demonstrating that similar equipment and terms could not be obtained at a lower cost from other customary sources of equipment. The required documentation shall include,

but not be limited to, copies of the rental or leasing agreements, and the names, addresses, and terms quoted by other sources of equipment.

PRE-AWARD PROVISIONS

D. Requests For Waiver. A potential bidder may request a waiver of all or part of a contract's M/WBE goals by submitting a written request to OEODC. A potential bidder is defined as one who has purchased the contract documents. The request shall be submitted no later than twenty-five (25) calendar days prior to the contract letting, in order to allow sufficient time for a review and issuance of an amendment of the established goals, if necessary, in accordance with the Department's schedule for contract amendments. The request should contain sufficient justification as to why the goals should be waived or reduced, and should at least address the following factors: the potential Bidder's method of accomplishing the work, the subcontracting opportunities associated with the proposed method, and the availability of certified M/WBEs for the work to be subcontracted.

E. Good Faith Efforts. To determine whether a bidder that has failed to meet the M/WBE contract goals may receive the contract, the Department will decide whether the efforts the Bidder made to obtain M/WBE participation were "good faith efforts" to meet the goals. Efforts that are merely pro forma are not good faith efforts to meet the goals. Efforts to obtain M/WBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of M/WBE participation sufficient to meet the goals. In order to award a contract to a bidder that has failed to meet the M/WBE contract goals, the Department will determine that the Bidder's efforts were those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the goals would make.

In order to evaluate the Bidder's conformance to this subsection, the Department will consider the quality, quantity, and intensity of the different kinds of efforts that the Bidder has made. The following is a list of the types of actions which the Department will consider as part of the Bidder's good faith efforts to obtain M/WBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exhaustive or exclusive. Other factors or types of efforts may be relevant in appropriate cases.

The following is a list of the kinds of efforts that the Department will evaluate to determine if the Bidder has demonstrated a good faith effort:

1. Efforts to secure participation by certified M/WBE firms for work that they are listed to perform that is in the contract. Only M/WBEs certified by the ESDC shall be used to fulfill the established goals on 100% State funded contracts.
2. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified M/WBEs who have the capability to perform the work of the contract. The Bidder shall solicit this interest within sufficient time to allow the M/WBEs to respond to the solicitation. The Bidder shall determine with certainty if the M/WBEs are interested by taking appropriate steps to follow up on initial solicitations.
3.
 - a. The Bidder shall, at a minimum, seek certified M/WBEs in the same geographic area where the project is located. This is defined as a one hundred (100) kilometer radius around the city, town or borough where the project is located as identified in the contract proposal. For specialty work such as pavement markings, guide rail, etc. (as defined in the contract proposal) the Bidder shall, at a minimum, solicit on an upstate or downstate basis, depending upon the location of the project.
 - b. The Department has facilitated identification of these areas through its automated M/WBE solicitation program, which is accessible on the Internet on the Department's Web Page at www.dot.state.ny.us. For more information please contact the NYSDOT Help Desk at (518) 485-8111. For those bidders who do not have this automation capability, a solicitation report (i.e., paper copy) for a specific contract can be requested by contacting OEODC's Construction Program Unit at (518) 457-1129.
4. Selecting portions of the work to be performed by M/WBEs in order to increase the likelihood that the M/WBE goals will be achieved. This includes, where appropriate, either breaking down operations within the contract or combining like or related operations in the contract into logistically and economically feasible units to facilitate M/WBE participation, even when the Contractor might otherwise prefer to perform these work items with its own forces.
5. Providing interested M/WBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

6. a. Negotiating in good faith with interested M/WBEs. It is the Bidder's responsibility to make a portion of the work available to M/WBE subcontractors and material suppliers and to select those portions of the work or material needs consistent with the available M/WBE subcontractors and material suppliers, so as to facilitate M/WBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of M/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for M/WBEs to perform the work.
 - b. The fact that there may be some additional costs involved in finding and using M/WBEs is not in itself sufficient reason for a bidder's failure to meet the contract M/WBE goals, as long as such costs are reasonable. The ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the Bidder of the responsibility to make good faith efforts. Bidders are not, however, required to accept higher quotes from M/WBEs if the price difference is excessive or unreasonable.
7. Not rejecting M/WBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.
8. Making efforts to assist interested M/WBEs in obtaining bonding, lines of credit or insurance as required by the Department.
9. Making efforts to assist interested M/WBEs in obtaining necessary equipment, supplies, materials, or related assistance.
10. Effectively using the services of available minority/women focused media, trade associations, and contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of M/WBEs.
11. Record of solicitation effort. All bidders shall keep records of efforts to solicit and negotiate with M/WBEs, using Form AAP-10, Solicitation Log as a continuing record of pre- and post-letting solicitation activity. When submitting a Form AAP-19, D/M/WBE Schedule of Utilization to the Department, the Apparent Low Bidder will attach the log, together with the supplemental information specified in the instructions for the Form AAP-10, Solicitation Log as evidence of good-faith efforts. Such supplemental efforts shall include at least the following:
 - a. All envelopes of solicitation inquires that were returned as undeliverable; and
 - b. Any quotations submitted by M/WBEs that are not included in the Form AAP-19, D/M/WBE Schedule of Utilization with an explanation for the Bidder's action in each case.

F. M/WBE Utilization Package. The Apparent Low Bidder shall submit a complete utilization package within seven (7) calendar days after the bid opening. The M/WBE utilization package consists of:

1. Form AAP-19, D/M/WBE Schedule of Utilization;
2. Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet (NOTE: Form AAPHC-89 shall be co-signed by both the Contractor and the M/WBE); and
3. Documentation that substantiates good faith efforts as described in paragraph E.

If the Apparent Low Bidder has met or exceeded the established M/WBE goals for the contract utilizing certified M/WBEs it is not necessary to submit documentation of good faith efforts as described in paragraph E. If the Apparent Low Bidder owns CHAMP™ Management System, the Bidder shall submit AAP-19 and AAPHC-89 forms generated by CHAMP™ Management System.

G. Bidder's Failure to Comply. The Department's acceptance of the Bidder's proposal is conditioned upon the Bidder's fulfillment of the requirements of this subsection. If the Bidder fails to submit a complete utilization package as defined in paragraph E within seven (7) calendar days after the bid opening and/or fails to attain the M/WBE utilization goals, and to satisfactorily document his/her good faith efforts as defined in paragraph E above, the bid may be declared incomplete and the deposit may be subject to forfeiture pursuant to §103-02, *Execution of Contract*. The Bidder, upon receipt of written notification of his/her failure to comply with the requirements of this subsection shall have five (5) business days to carry out the corrective action(s) described in the notification.

If the Department determines that the Apparent Low Bidder has failed to meet the good faith efforts requirements of paragraph E, the Department will, before awarding the contract, provide the Apparent Low Bidder an opportunity for administrative reconsideration by an official who did not take part in the original determination

that the Apparent Low Bidder failed to meet the goals or make adequate good faith efforts to do so. As part of this reconsideration, the Apparent Low Bidder shall have the opportunity to provide written documentation or argument and to meet in person with the Department's reconsideration official concerning the issue of whether it met the goals or made adequate good faith efforts to do so. The Department will send the Apparent Low Bidder a written decision on reconsideration, explaining the basis for finding that the Apparent Low Bidder did or did not meet the goals or make adequate good faith efforts to do so.

POST AWARD PROVISIONS

H. Conformance to M/WBE Schedule of Utilization. The Contractor shall execute subcontracts or agreements with the M/WBEs identified on the approved Form AAP-19, D/M/WBE Schedule of Utilization, for work of the kind and amount identified therein. The Engineer will monitor the work of the contract to ensure that the M/WBEs identified on Form AAP-19, D/M/WBE Schedule of Utilization perform the work. Any direction by the Engineer to comply with the Schedule is a lawful direction under Article 8 of the contract. While such direction is not complied with, the Contractor shall not be entitled to have any estimate made for the purpose of payment, nor shall any estimate be rendered on account of work done or material furnished.

I. Revisions in M/WBE Utilization. After award of the contract, any change in M/WBE utilization must be approved by the Department through submission of a revised Form AAP-19, D/M/WBE Schedule of Utilization, and a revised Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet signed by both parties. The Contractor must receive this approval prior to implementing any proposed change. In the cases of reduction, removal or substitution, the Contractor shall provide written justification with a substantive basis for the change. A Contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for change.

If the reduction of the M/WBE's work or the removal of the M/WBE including for reasons of commercially useful function violations, causes the M/WBE utilization to fall below the goals, the Contractor will be required to make good faith efforts to find another M/WBE subcontractor to substitute for the original M/WBE to perform at least the same amount of work under the contract as the M/WBE that was terminated, to the extent needed to meet the contract goals. This requirement also applies to reductions of creditable participation resulting from determinations that work does not meet the commercially useful function criteria set forth in paragraph C(1).

An M/WBE may be substituted if its intended work is deleted or diminished by the Department and the total contract work has not progressed beyond the point where not enough work remains to substitute an equal amount to the affected M/WBE. If the work has significantly progressed, the Department may relieve the Contractor from attaining that portion of the goals.

For the purposes of this subsection, any of the following modifications will be considered a revision in M/WBE utilization.

1. Reducing the dollar value of or eliminating the M/WBE's item(s) of work.
2. Removing one M/WBE and substituting another M/WBE for the same item(s) of work.
3. Increasing the dollar value of an item(s) of work or adding new item(s) of work to an M/WBE already participating on the contract.
4. Adding an M/WBE to the contract.

J. Monitoring Contractor Compliance. The Contractor shall allow authorized representatives of the Department to conduct periodic inspections of the Contractor's M/WBE participation efforts during the performance of this contract. In order to determine whether the Contractor has complied with the requirements of this subsection, the Commissioner may direct the Contractor to attend a hearing before the Contract Review Unit, or may file a complaint with the ESDC Division of Minority and Women's Business Development pursuant to Executive Law, Article 15A, Section 316, or may follow any other lawful procedure upon due notice in writing to the Contractor. When a Contractor has been found to have failed to meet the contract goals, to exert a good faith effort, or otherwise failed to comply with this subsection, the contract may be canceled, terminated, or suspended in whole or in part in accordance with Article 11 of the contract and Section 40 of the Highway Law. Such other sanctions may also be imposed and remedies invoked as provided under the authority of Executive Law Article 15A, 5 NYCRR 140 et seq., or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

Goal attainment will be measured based on payments made to M/WBEs. The Contractor shall report payments made to all M/WBEs participating in the contract on a regular basis and at completion of the contract, in a format approved by the Department.

K. Prompt Payment. The Contractor shall pay the M/WBE in accordance with §109-06, *Progress Payments* and §109-08, *Prompt Payments by the Contractor*. Failure by the Contractor to do so may result in the withholding of future estimated payments by the Department.

L. Non-discrimination. The Contractor shall not use the requirements of these Specifications to discriminate against any qualified company or group of companies.

M. Reporting Violations of Program Rules. If the Contractor becomes aware of any violations of this Specification, the Contractor shall promptly report the violations to the Engineer.

102-22 DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION. The Department seeks to achieve the following:

- To ensure nondiscrimination in award and administration of Department contracts;
- To ensure that only firms that fully meet DBE eligibility standards are permitted to participate in the Department's DBE program;
- To help remove barriers to the participation of DBEs in the performance of Department contracts;
- To create a level playing field on which DBEs can fairly compete for Department contracts; and
- To assist in the development of DBE firms that can compete successfully in the construction industry outside the DBE program.

The parties to this contract shall take all necessary and reasonable steps in accordance with the laws, rules and regulations cited in this subsection to promote the objectives outlined above. The Department and its Contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of Department contracts. This policy shall be made a part of all subcontracts and agreements entered into as a result of this contract.

The Congress of the United States, to this end, has enacted the Surface Transportation Assistance Act (STAA) of 1982, Public Law 97-424, §105(f), the Surface Transportation and Uniform Relocation Assistance Act of 1987, Public Law 100-17, §106(c), the Intermodal Surface Transportation Efficiency Act of 1991 and the Transportation Equity Act of the 21st Century and regulations have been promulgated under 49 CFR 26 and 17 NYCRR 35. New York State, to this end, has enacted Section 85 of the Highway Law and Section 428 of the Transportation Law. The parties to this contract shall comply with these laws, rules and regulations and the following DBE Program requirements:

GENERAL PROVISIONS

A. Goal

1. Established Goal. The Department may have established contract utilization goal for DBEs, expressed as a percentage of the total contract price. The goal is stated in the proposal and remains in effect throughout the life of the contract. In executing the contract or bid documents the Bidder declares that it subscribes to the utilization goal and shall meet the goal or demonstrate that it could not meet it despite its best efforts. Failure to meet the established goal for the contract and failure to meet the good faith efforts, as defined in paragraph E, may be grounds for rejection of the bid as non-responsive. When the contract is awarded with DBE participation that is less than the contract goal, the Contractor shall continue good faith efforts, as defined in paragraph E, throughout the life of the contract.

2. Zero Percent Goal. When the Department has established a zero goal for participation by DBEs and the Bidder proposes the use of a subcontractor or the purchase of goods from a material supplier at any time during the life of the contract, the Contractor agrees to promote the objectives outlined in this subsection by providing opportunities for DBEs to participate in these areas, with such participation to be credited towards the race-neutral component of the Department's DBE Program.

B. Counting DBE Participation Towards the DBE Goal. The value of work actually performed by the DBE will be counted toward the goal in the amounts set forth below. The cost of supplies purchased or materials obtained by the DBE, except for supplies purchased or equipment leased from the Contractor, other subcontractors on the contract, or their affiliates will also be counted. The proposed utilization shall be considered to be a commercially useful function, as defined in paragraph C(1). If the Department determines that some or all of the DBE's work does not constitute a commercially useful function, only the portion of the work considered to be a commercially useful function will be credited toward the goal. The DBE has the ability to rebut a determination by the Department that the DBE is not performing a commercially useful function to FHWA. The Department's determination is subject to review by FHWA but is not appealable to USDOT. A DBE that holds a Department contract may not count its own utilization in the contract toward the DBE contract goal.

DBE participation shall be counted toward meeting the DBE goal in accordance with the following:

1. Eligibility. Only those DBE firms that are certified by the Department are eligible to be used for goal attainment on this contract. A DBE must be certified on the day the contract is let. DBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as a DBE.

2. Subcontracting. The total agreed value of work to be performed by the DBE's own forces is counted toward the applicable DBE goal, except as provided in numbers 3 through 6 below.

3. Joint Ventures. The total dollar value of the contract equal to the distinct, clearly defined portion of the work in the contract that the DBE performs with its own equipment, and with its own forces under its own supervision will be counted toward the DBE contract goal, subject to approval by the Department of the joint venture agreement to be furnished by the Bidder before award of the contract. The joint venture agreement shall include a detailed breakdown of the following:

- a. Contract responsibility of the DBE for specific contract items of work;
- b. Capital participation by the DBE;
- c. Specific equipment to be provided to the joint venture by the DBE;
- d. Specific responsibilities of the DBE in the control of the joint venture;
- e. Specific staffing and skills to be provided to the joint venture by the DBE; and
- f. Percentage distribution to the DBE of the projected profit or loss incurred by the joint venture.

In addition to these requirements, the DBE joint venture must perform a commercially useful function as a DBE as defined in paragraph (C)(1).

4. Manufacturers, Fabricators and Material Suppliers. Expenditures for materials and supplies obtained from DBE Manufacturers, Fabricators and Material Suppliers in the amounts noted below will be counted toward the DBE goal. The DBE Manufacturer, Fabricator or Material Supplier shall assume the actual and contractual responsibility for the provision of the materials and supplies.

- a. Count 100% of the expenditure to a DBE Manufacturer or Fabricator.
- b. Count 60% (sixty percent) of the expenditure to a DBE Material Supplier. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not Material Suppliers within the meaning of this paragraph.
- c. With respect to materials or supplies purchased from a DBE which is neither a Manufacturer nor a Fabricator nor a Material Supplier, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees for transportation charges for the delivery of materials or supplies required on a project site toward the DBE goal, provided they are determined by the Department to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves are not counted.
- d. The Bidder shall indicate in the form of an explanation on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, the specification section number(s) (3 digits) of the material to be supplied, manufactured, fabricated, or otherwise provided.

5. Trucking Operations. Count toward the DBE goal the expenditure for trucking operations provided by certified DBEs in accordance with the following:

- a. To satisfy the criterion of performing a commercially useful function as a subcontractor, a DBE shall own and operate at least one registered, insured, and fully operational truck used on the contract and shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the DBE goal.
- b. The DBE receives credit for 100% of the value of the trucking operations it provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the DBE using drivers it employs.
- c. The DBE may lease trucks on a short-term basis from another DBE, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for 100% of the value of the trucking operations that the lessee DBE provides on the contract.
- d. The DBE may lease trucks on a short-term basis from a non-DBE, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the value of the trucking operations provided by the lessee, because these operations are not provided by a DBE.

- e. The Bidder shall provide the following with the utilization package as described in paragraph F:
1. Copies of all lease agreements utilized by the DBE; and
 2. Calculations and any pertinent documentation that support the dollar value of the proposed DBE trucking operations; e.g., method of payment (hour, ton or load hauled), the number of trucks required to perform the trucking operations listed on the Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, and the duration of the trucking operations to be performed.
- f. The Bidder shall indicate in the form of an explanation on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet, the Specification section number(s) (3 digits) for which the trucking operations are to be performed, the type of trucking operation to be performed (i.e., on-site vs. off-site), and the corresponding dollar value for those operations, per item.
- In accordance with 29 CFR 5.2(i), "site of the work" is defined as the physical place or places where the construction called for in the contract will remain when work on it has been completed. Facilities such as fabrication plants, mobile factories, batch plants, borrow pits, etc. are part of the work site provided that they are dedicated exclusively to the performance of the contract. Not included in the site of the work are facilities whose continuance in operation are determined wholly without regard to a particular contract. Such permanent, previously established facilities are not a part of the "site of work," even where the operations for a period of time may be dedicated exclusively, to the performance of a contract.
- g. The DBE trucking firm of record is the firm that is listed on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet. The DBE trucking firm of record shall control the day-to-day trucking operations on the project, and is responsible for:
1. Negotiating and executing rental/leasing agreements;
 2. Hiring and firing the work force;
 3. Coordinating the daily trucking needs with the Contractor; and
 4. Scheduling and dispatching trucks.

6. Partial Items. The Bidder shall explain in the writing the scope of work to be performed by the DBE for all items indicated as partial items on the AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet at the time the Bidder submits the Utilization Package.

7. Other. Count the entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

C. Conditions of Participation. DBE participation will be counted toward meeting the DBE contract goal, subject to all of the following conditions:

1. Commercially Useful Function. A DBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of work on a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved in accordance with normal industry practice. Regardless of whether an arrangement between the Contractor and the DBE represent standard industry practice, if the arrangement erodes the ownership, control or independence of the DBE or in any other way does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the goal and may be required to backfill the participation in accordance with paragraph I. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.

2. Work Force. The DBE shall employ a work force, (including administrative and clerical) separate and apart from that employed by the Contractor, other subcontractors on the project, or their affiliates. This does not preclude the employment by the DBE of an individual that has been previously employed by another firm involved in the contract, provided that the individual was independently recruited by the DBE in accordance with customary industry practice. The routine transfer of work crews from another employer to the DBE shall not be allowed.

3. Supervision. All work performed by the DBE shall be controlled and supervised by the DBE without duplication of supervisory personnel from the Contractor, other subcontractors on the project, or their affiliates. This does not preclude routine communication between the supervisory personnel of the DBE and other supervisors necessary to coordinate the work of the contract.

4. Equipment. DBE subcontractors may supplement their equipment by renting or leasing additional equipment in accordance with customary industry practice. However, no more than 50% of the cost of the equipment required to perform the work of the subcontractor may be obtained from the Contractor, other subcontractors on the project, or their affiliates. If the DBE obtains equipment from any of those sources, the DBE shall provide documentation to the Department demonstrating that similar equipment and terms could not be obtained at a lower cost from other customary sources of equipment. The required documentation shall include, but not be limited to, copies of the rental or leasing agreements, and the names, addresses, and terms quoted by other sources of equipment.

PRE-AWARD PROVISIONS

D. Requests For Waiver. A potential bidder may request a waiver of all or part of a contract's DBE goal by submitting a written request to OEODC. A potential bidder is defined as one who has purchased the contract documents. The request shall be submitted no later than twenty-five (25) calendar days prior to the contract letting, in order to allow sufficient time for a review and issuance of an amendment of the established goal, if necessary, in accordance with the Department's schedule for contract amendments. The request should contain sufficient justification as to why the goal should be waived or reduced, and should at least address the following factors: the potential Bidder's method of accomplishing the work, the subcontracting opportunities associated with the proposed method, and the availability of certified DBEs for the work to be subcontracted.

E. Good Faith Efforts. To determine whether a bidder that has failed to meet the DBE contract goal may receive the contract, the Department will decide whether the efforts the Bidder made to obtain DBE participation were "good faith efforts" to meet the goal. Efforts that are merely pro forma are not good faith efforts to meet the goal. Efforts to obtain DBE participation are not good faith efforts to meet the goal, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of DBE participation sufficient to meet the goal. In order to award a contract to a bidder that has failed to meet the DBE contract goal, the Department will determine that the Bidder's efforts were those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the goal would make.

In order to evaluate the Bidder's conformance to this subsection, the Department will consider the quality, quantity, and intensity of the different kinds of efforts that the Bidder has made. The following is a list of the types of actions which the Department will consider as part of the Bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exhaustive or exclusive. Other factors or types of efforts may be relevant in appropriate cases.

The following is a list of the kinds of efforts that the Department will evaluate to determine if the Bidder has demonstrated a good faith effort:

1. Efforts to secure participation by certified DBE firms for work that they are listed to perform that is in the contract. Only DBEs certified by the Department shall be used to fulfill the established goal on federally aided contracts.
2. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The Bidder shall solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The Bidder shall determine with certainty if the DBEs are interested by taking appropriate steps to follow up on initial solicitations.
3.
 - a. The Bidder shall, at a minimum, seek certified DBEs in the same geographic area where the project is located. This is defined as a one hundred (100) kilometer radius around the city, town or borough where the project is located as identified in the contract proposal. For specialty work such as pavement markings, guide rail, etc. (as defined in the contract proposal) the Bidder shall, at a minimum, solicit on an upstate or downstate basis, depending upon the location of the project.
 - b. The Department has facilitated identification of these areas through its automated DBC solicitation program, which is accessible via the Internet on the Department's Web Page at www.dot.state.ny.us. For more information please contact the NYSDOT Help Desk at (518) 485-8111. For those bidders who do not have this automation capability, a solicitation report (i.e., paper copy) for a specific contract can be requested by contacting OEODC's Construction Program Unit at (518) 457-1129.
4. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal will be achieved. This includes, where appropriate, either breaking down operations within the contract or combining like or related operations in the contract into logistically and economically feasible units to

facilitate DBE participation, even when the Contractor might otherwise prefer to perform these work items with its own forces.

5. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
6.
 - a. Negotiating in good faith with interested DBEs. It is the Bidder's responsibility to make a portion of the work available to DBE subcontractors and material suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and material suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.
 - b. The fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. The ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the Bidder of the responsibility to make good faith efforts. Bidders are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
7. Not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.
8. Making efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance as required by the Department.
9. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance.
10. Effectively using the services of available minority/women focused media, trade associates, and contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
11. Record of solicitation effort. All bidders shall keep records of efforts to solicit and negotiate with DBEs, using Form AAP-10, Solicitation Log as a continuing record of pre- and post-letting solicitation activity. When submitting a Form AAP-19, D/M/WBE Schedule of Utilization to the Department, the Apparent Low Bidder will attach the log, together with the supplemental information specified in the instructions for the Form AAP-10, Solicitation Log as evidence of good-faith efforts. Such supplemental efforts shall include at least the following:
 - a. All envelopes of solicitation inquires that were returned as undeliverable; and
 - b. Any quotations submitted by DBEs that are not included in the Form AAP-19, D/M/WBE Schedule of Utilization with an explanation for the Bidder's action in each case.

F. DBE Utilization Package. The Apparent Low Bidder shall submit a complete utilization package within seven (7) calendar days after the bid opening. The DBE utilization package consists of:

1. Form AAP-19, D/M/WBE Schedule of Utilization;
2. Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet (NOTE: Form AAPHC-89 shall be co-signed by both the Contractor and the DBE); and
3. Documentation that substantiates good faith efforts as described in paragraph E.

If the Apparent Low Bidder has met or exceeded the established DBE goal for the contract utilizing certified DBEs, it is not necessary to submit documentation of good faith efforts as described in paragraph E. If the Apparent Low Bidder owns CHAMP® software, the Bidder shall submit AAP-19 and AAPHC-89 forms generated by CHAMP®.

G. Bidder's Failure to Comply. The Department's acceptance of the Bidder's proposal is conditioned upon the Bidder's fulfillment of the requirements of this subsection. If the Bidder fails to submit a complete utilization package as defined in paragraph F within seven (7) calendar days after the bid opening and/or fails to attain the DBE utilization goal, and to satisfactorily document his/her good faith efforts as defined in paragraph E above, the bid may be declared incomplete and the deposit may be subject to forfeiture pursuant to § 103-02, *Execution of Contract*.

The Bidder, upon receipt of written notification of his/her failure to comply with the requirements of this subsection shall have five (5) business days to carry out the corrective action(s) described in the notification.

If the Department determines that the Apparent Low Bidder has failed to meet the good faith effort requirements of paragraph E, the Department will, before awarding the contract, provide the Apparent Low Bidder an opportunity for administrative reconsideration by an official who did not take part in the original determination that the Apparent Low Bidder failed to meet the goal or make adequate good faith efforts to do so. As part of this reconsideration, the Apparent Low Bidder shall have the opportunity to provide written documentation or argument and to meet in person with the Department's reconsideration official concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Department will send the Apparent Low Bidder a written decision on reconsideration, explaining the basis for finding that the Apparent Low Bidder did or did not meet the goal or make adequate good faith efforts to do so.

POST AWARD PROVISIONS

H. Conformance to DBE Schedule of Utilization. The Contractor shall execute subcontracts or agreements with the DBEs identified on the approved Form AAP-19, D/M/WBE Schedule of Utilization, for work of the kind and amount identified therein. The Engineer will monitor the work of the contract to ensure that the DBEs identified on Form AAP-19, D/M/WBE Schedule of Utilization perform the work. Any direction by the Engineer to comply with the Schedule of Utilization is a lawful direction under Article 8 of the contract. While such direction is not complied with, the Contractor will not be entitled to have any estimate made for the purpose of payment, nor will any estimate be rendered on account of work done or material furnished.

I. Revisions in DBE Utilization. After award of the contract, any change in DBE utilization must be approved by the Department through submission of a revised Form AAP-19, D/M/WBE Schedule of Utilization, and a revised Form AAPHC-89 (Part 1), D/M/WBE Utilization Worksheet signed by both parties. The Contractor shall obtain this approval prior to implementing any proposed change. In the cases of reduction, removal or substitution, the Contractor shall provide written justification with a substantive basis for the change. A Contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for change.

If the reduction of the DBE's work or the removal of the DBE including for reasons of commercially useful function violations, causes the DBE utilization to fall below the goal, the Contractor will be required to make good faith efforts to find another DBE subcontractor to substitute for the original DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal. This requirement also applies to reductions of creditable participation resulting from determinations that work does not meet the commercially useful function criteria set forth in paragraph C(1).

A DBE may be substituted if its intended work is deleted or diminished by the Department and the total contract work has not progressed beyond the point where not enough work remains to substitute an equal amount to the affected DBE. If the work has significantly progressed, the Department may relieve the Contractor from attaining that portion of the goal.

For the purposes of this subsection, any of the following modifications will be considered a revision in DBE utilization.

1. Reducing the dollar value of or eliminating the DBE's item(s) of work.
2. Removing one DBE and substituting another DBE for the same item(s) of work.
3. Increasing the dollar value of an item(s) of work or adding new item(s) of work to a DBE already participating on the contract.
4. Adding a DBE to the contract.

J. Monitoring Contractor Compliance. The Contractor shall allow authorized representatives of the Department to conduct periodic inspections of the Contractor's DBE participation efforts during the performance of this contract. In order to determine whether the Contractor has complied with the requirements of this subsection, the Commissioner may direct the Contractor to attend a hearing before the Contract Review Unit, or may follow any other lawful procedure upon due notice in writing to the Contractor. When a Contractor has been found to have failed to meet the contract goal, to exert a good faith effort, or otherwise failed to comply with this subsection, the contract may be canceled, terminated, or suspended in whole or in part in accordance with Article 11 of the contract and Section 40 of the Highway Law. The Contractor may also be referred to the USDOT for possible suspension or debarment as provided in 49 CFR 29 and such other sanctions as may be imposed and remedies invoked as provided under the authority of 49 CFR 26, or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

Goal attainment will be measured based on payments made to DBEs. The Contractor shall report payments made to all DBEs participating in the contract on a regular basis and at completion of the contract, in a format approved by the Department.

K. Prompt Payment. The Contractor shall pay the DBE in accordance with §109-03, *Progress Payments* and §109-08, *Prompt Payments by the Contractor* and failure by the Contractor to do so may result in the withholding of future estimated payments by the Department.

L. Non-discrimination. The Contractor shall not use the requirements of these Specifications to discriminate against any qualified company or group of companies.

M. Reporting Violations of Program Rules. If the Contractor becomes aware of any violations of this Specification, the Contractor shall promptly report the violations to the Engineer.