

**REVISIONS TO STANDARD SPECIFICATIONS SECTION 100 - CIVIL RIGHTS REPORTING
COMMENTARY**

102-11 EEO Requirements

C. *Employment Goals* – Last 2 paragraphs moved to 105-21

D.2. *EEO Officer* – Moved to §105-21 and expanded to cover EEO and DBE Officers

D.6. *Workforce and Training Utilization* – moved to §105-21B. Eliminated references to OJT, which is covered under 691 specification, when applicable.

D.7. *Reports and Records* – Moved to §105-21C.

D./D.3./D.5./D.6.(revised) Added required language from 41 CFR 60-1.4(b)

G. *Enforcement* – Moved to §105-21C.4.

H. *Hometown Plans* – Modified to required language from 41 CFR 60-4.3 and relabeled G.

102-12 D/M/WBE Requirements

C. *Eligibility* - Inserted from D.1. Subsequent paragraphs relabeled

D. *Counting Participation* – Participation of prime D/M/WBE counts towards contract goal

D.3. – Removed Joint Venture language, not consistent with CFR

D.4. *Vendors* – Deleted header paragraph, and created separate paragraphs for Manufacturers/Fabricators (D.2.), Material Suppliers (D.3.) and Brokers (D.4.).

D.5. *Trucking* – Renumbered D.6.

D.5.a. – Moved to D.6.

D.5.e./f. – Moved to H. *D/M/WBE Utilization Package*

D.5.g. – Moved to D.6.

D.6. *Partial Items* – Moved to H. *D/M/WBE Utilization Package*

D.7. *Other* – Renumbered and renamed D.5. *Services*

G. *Good Faith Efforts*

G.3. Removed 100 km radius for solicitation, and removed reference to OEODC/solicitation program, neither of which currently exist.

G.11. Moved submittal of solicitation log to paragraph H.

H. *D/M/WBE Utilization Package*. – Consolidated information from remainder of section into single paragraph. Made edits to recognize electronic process in EBO.

I. Conformance to Schedule of Utilization – Moved first sentence to H. Utilization Package
- deleted reminder of paragraph, redundant with §105-21 and §109-06

J. *Revisions* – Moved to §105-21D

K. *Monitoring Contractor Compliance* - Moved to §105-21

L. *Prompt Payment* – Deleted, Redundant with §109-07

M. *Non-discrimination* - Moved to §102-12, 2nd paragraph

N. *Reporting Violations of Program Rules*. – Deleted, Unnecessary.

105-21 Civil Rights Monitoring and Reporting

Changed threshold for reporting from contracts over \$100k to all contracts.

C.1. Utilization data is tabulated and percentages calculated separately for females and minorities.

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Make the following changes to the Standard Specifications dated May 4, 2006:
Page 37-50 **Delete** §102-11 and §102-12 and **Replace** them with the following:

102-11 EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENTS. The Department seeks to ensure nondiscrimination in employment under all Department contracts. The Contractor shall comply with the following Equal Employment Opportunity (EEO) requirements. The goals for a specific contract are contained in the Special Note *Goals for Equal Opportunity Employment Participation* in the contract proposal. The covered area is the county or counties in which the work is located.

For Federal-Aid contracts, Equal Employment Opportunity provisions are also found on Form FHWA 1273 *Required Contract Provisions Federal-Aid Construction Contracts*, or Form FHWA 1316 *Required Contract Provisions Appalachian Development Highway System and Local Access Roads Construction Contracts*, one of which is incorporated in the contract proposal.

Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

A. Statutory Authority. The Federal statutory authority for Equal Employment Opportunity provisions is contained in 23 U.S.C. 140(a), 23 CFR 230, 41 CFR 60-1 and 60-4, and Executive Order 11246. State statutory authority is contained in Section 85 of the Highway Law, Section 428 of the Transportation Law, NYS Executive Law Article 15-A, 5 NYCRR 140 et seq and the rules promulgated there under.

B. Definitions.

1. For Federal-Aid contracts, a minority group member is defined under this subsection as someone who is, and can demonstrate membership in, one of the following groups:

- a. Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
- b. Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
- c. Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
- d. American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. For non Federal-Aid contracts, a minority group member is defined under this subsection as a United States citizen or permanent resident alien who is, and can demonstrate membership in, one of the following groups:

- a. Black persons having origins in any of the Black African racial groups;
- b. Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race;
- c. Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent, or the Pacific Islands;
- d. Native American or Alaskan native persons having origins in any of the original peoples of North America.

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C. Employment Goals. A goal(s) for minorities and a separate goal(s) for women are presented in the contract documents. The Contractor shall provide equal employment opportunity and shall take affirmative action for all minority groups, both male and female; and women, both minority and non-minority. If the Contractor performs work outside of the covered area, it shall apply the goals established for the county where the work is actually performed. The Department will monitor the Contractor's attainments towards EEO goals in accordance with §105-21 *Civil Rights Monitoring and Reporting*.

The goal(s) set for the contract are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. The Contractor is expected to make substantially uniform progress in meeting its goals in each trade. The hours of minority and female employment and training shall be substantially uniform throughout the length of the contract, and in each trade, and the Contractor shall make a good faith effort to employ minorities and women evenly on each of its contracts. The transfer of minority or female employees, apprentices, or trainees from contractor to contractor or from contract to contract for the sole purpose of meeting the Contractor's goals is a violation of the contract.

D. Contractor Obligations. The Contractor shall comply with all provisions of Federal Executive Order 11246 and the provisions of State and Federal laws and regulations. The Contractor shall furnish all information and reports required by Executive Order 11246 and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the Department and the U.S. Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders. The Contractor shall develop and implement an EEO policy in accordance with Form FHWA 1273 *Required Contract Provisions Federal-Aid Construction Contracts* for Federal-Aid contracts and in accordance with §102-08 *Standard Clauses for All New York State Contracts* for non Federal-Aid contracts.

1. Non-Discrimination. The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, age, disability or marital status. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, national origin, age, disability or marital status. Such actions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Department setting forth the provisions of this non-discrimination clause.

The Contractor shall not use the goals or affirmative action requirements to discriminate against any person because of race, color, religion, sex, national origin, age, disability or marital status.

2. Solicitations. The Contractor shall state in all solicitations or advertisements for employees placed by or on behalf of the Contractor, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, age, disability or marital status.

3. Collective Bargaining Agreements. The contractor shall send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments to equal employment opportunities, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

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Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations.

4. Complaints of Alleged Discrimination. The Contractor shall promptly investigate all complaints of alleged discrimination made to the Contractor in connection with its obligations under this contract, shall attempt to resolve such complaints, and shall take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, corrective action shall include such other persons. Upon completion of each investigation, the Contractor shall inform every complainant of all available avenues of appeal.

5. Non-Compliance. In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246, or by rule, regulation, or order of the U.S. Secretary of Labor, or as otherwise provided by law.

6. Subcontracts/Purchase Orders. The Contractor shall include the provisions of §102-11D *Contractor Obligations* in every subcontract or purchase order, so that such provisions will be binding upon each subcontractor or vendor. In the event a Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Department, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

E. Affirmative Action Steps. The Contractor shall take specific affirmative actions to promote equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

1. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, shall assign two or more women to each construction contract. The Contractor shall specifically ensure that all forepersons, superintendents, and other onsite supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

2. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

3. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore, along with whatever additional actions the Contractor may have taken.

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- 4.** Provide immediate written notification to the Department when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.
- 5.** Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by either the NYS Department of Labor or the US Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under E.2. above.
- 6.** Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- 7.** Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as superintendents, forepersons, etc., prior to the initiation of construction work at any contract site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- 8.** Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other contractors and Subcontractors with whom the Contractor does or anticipates doing business.
- 9.** Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- 10.** Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of the Contractor's work force.
- 11.** Validate all tests and other selection requirements in accordance with state and Federal laws, rules and regulations.
- 12.** Conduct, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities. Encourage these employees to seek or to prepare for promotional opportunities through appropriate training, etc.

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13. Ensure that seniority practices, labor classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

14. Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

15. Document and maintain a record of all solicitations of offers for Subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

16. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

F. Associations. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations. The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the Contractor is a member and participant, may be asserted as fulfilling one or more of its obligations, provided that the Contractor actively participates in the group, makes every effort to ensure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

G. Hometown Plans (Federal-Aid Contracts Only). If a Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the USDOL in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors participating in Hometown Plans shall be able to demonstrate their participation and document their compliance with the provision of the Hometown Plan. Each Contractor participating in an approved plan is individually required to comply with its obligation under the EEO clause and to make a good faith effort to achieve each goal under the plan in each trade in which it has employees. The overall good faith performance by other Contractors toward a goal in an approved plan does not excuse any covered Contractor's failure to take good faith efforts to achieve the Plan goals and timetables.

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102-12 D/M/WBE UTILIZATION. D/M/WBE is a general term that refers to a Disadvantaged Business Enterprise (DBE), a Minority Business Enterprise (MBE) or a Women's Business Enterprise (WBE). The DBE program applies to Federal-Aid contracts, and the MBE/WBE (M/WBE) program applies to non Federal-Aid contracts. The Department seeks to:

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

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 comply with the applicable laws, rules and regulations and the D/M/WBE Program requirements stated below. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of Department contracts. The Contractor shall not use the requirements of these specifications to discriminate against any qualified company or group of companies. These requirements shall be made a part of all subcontracts and agreements entered into as a result of this contract.

A. Statutory Authority.

1. Disadvantaged Business Enterprise (DBE) Program. The Federal statutory authority for the DBE Program is contained in the Surface Transportation Assistance Act 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. New York State has enacted Section 85 of the Highway Law and Section 428 of the Transportation Law. Regulations have been promulgated under 49 CFR 26 and 17 NYCRR 35.

2. Minority/Women's Business Enterprise (M/WBE) Program. The State statutory authority for the M/WBE Program is contained in Section 85 of the Highway Law, Section 428 of the Transportation Law, and Executive Law Article 15A. Regulations have been promulgated under 5 NYCRR 140. The parties to this contract shall comply with these laws, rules and regulations and the M/WBE Program requirements stated below.

B. D/M/WBE Goal(s). Federal-aid contracts have a single DBE goal. Non Federal-Aid contracts have two separate and distinct goals, one for MBEs and one for WBEs, which cannot be combined. The Department will monitor the Contractor's attainments towards D/M/WBE goals in accordance with §105-21 *Civil Rights Monitoring and Reporting*.

1. Established Goal(s). The Department may have established contract utilization goal(s) for D/M/WBEs, which are expressed as a percentage of the total contract price. The goal(s) 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 goal(s) and shall meet the goal(s) or demonstrate that it could not meet them despite its best efforts. Failure to provide commitments to meet the established goal(s) for the contract and failure to meet the good faith efforts may be grounds for rejection of the bid as non-responsive. When the contract is awarded with D/M/WBE commitment(s) that is less than the contract goal(s), the Contractor shall continue good faith efforts throughout the life of the contract.

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2. Zero Percent Goal(s). When the Department has established zero goal(s) for participation by D/M/WBEs and the Bidder proposes the use of a Subcontractor, the purchase of materials, the use of a Service or the use of Trucking at any time during the life of the contract, the Contractor shall promote the objectives outlined in this subsection by providing opportunities for D/M/WBEs to participate in these areas, with such participation to be credited towards the race-neutral component of the Department's D/M/WBE Programs.

C. Eligibility.

1. DBE Eligibility. Only those DBE firms that are certified under the New York State Unified Certification Program are eligible to be used for goal attainment. 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. A business directory is available on the NYS Unified Certification Program website at <http://biznet/nysucp.net>.

2. M/WBE Eligibility. Only those M/WBE firms that are certified by the NYS Department of Economic Development are eligible to be used for goal attainment. 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. The participation of a firm that is certified as both an MBE and a WBE will only be counted toward one goal, and cannot be divided between the two goals. A business directory is available on the Empire State Development website at www.empire.state.ny.us.

D. Counting D/M/WBE Participation Towards the D/M/WBE Goal(s). The value of the work performed by a D/M/WBE, including that of a D/M/WBE prime contractor, with its own equipment, with its own forces, and under its own supervision will be counted toward the goal(s), provided the utilization is a commercially useful function. A D/M/WBE prime contractor shall still provide opportunities for participation by other D/M/WBEs. Work performed by D/M/WBEs working for the Contractor will be counted as set forth below. If the Department determines that some or all of the D/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 goal(s).

1. Subcontractors. 100% of the value of the work to be performed by a D/M/WBE Subcontractor will be counted toward the D/M/WBE goal(s), including the cost of materials and supplies purchased by the D/M/WBE, except the cost of supplies or equipment leased from the Contractor or its affiliates will not be counted.

2. Manufacturers/Fabricators. 100% of the expenditure to a D/M/WBE Manufacturer or Fabricator will be counted toward the D/M/WBE goal(s).

3. Material Suppliers. 60% of the expenditure to a D/M/WBE Material Supplier will be counted toward the D/M/WBE goal(s). Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not Material Suppliers within the meaning of this paragraph.

4. Brokers/Manufacturer's Representatives. 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 provided by a D/M/WBE Broker/manufacturer's Representative will be counted toward the D/M/WBE goal(s), 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 will not be counted.

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5. Services. The entire amount of fees or commissions charged by a D/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 will be counted toward the D/M/WBE goal(s), provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

6. Trucking Operations. The D/M/WBE trucking firm of record is the firm that is listed on the D/M/WBE Utilization Worksheet. The D/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 D/M/WBE goal(s). The D/M/WBE trucking firm of record shall control the day-to-day D/M/WBE trucking operations on the contract, and shall be 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.

a. D/M/WBE Owned/Leased Trucks. 100% of the value of the trucking operations the D/M/WBE provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the D/M/WBE using drivers it employs, will be counted toward the D/M/WBE goal(s).

b. D/M/WBE Short-Term Leased Trucks. The D/M/WBE may lease trucks on a short-term basis from another D/M/WBE, including an owner/operator who is certified as a D/M/WBE. 100% of the value of the trucking operations that the lessee D/M/WBE provides will be counted toward the D/M/WBE goal(s).

c. Non-D/M/WBE Trucks. The D/M/WBE may lease trucks on a short-term basis from a non-D/M/WBE, including an owner-operator. 100% of the fee or commission the D/M/WBE receives as a result of the lease arrangement will be counted toward the D/M/WBE goal(s). The value of the trucking operations provided by the lessee will not be counted toward the D/M/WBE goal(s).

E. Conditions of Participation. D/M/WBE participation will be counted toward meeting the D/M/WBE contract goal(s), subject to all of the following conditions:

1. Commercially Useful Function. A D/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 D/M/WBE represent standard industry practice, if the arrangement erodes the ownership, control or independence of the D/M/WBE or in any other way does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the goal(s) and may be required to backfill the participation. A D/M/WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction or contract through which funds are passed in order to obtain the appearance of D/M/WBE participation.

A DBE may rebut a determination by the Department that the DBE is not performing a commercially useful function to the Federal Highway Administration (FHWA) but the determination may not be appealed to USDOT. An M/WBE may rebut a determination by the Department that the M/WBE is not performing a commercially useful function to the NYS Department of Economic Development.

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2. Work Force. The D/M/WBE must employ a work force, (including administrative and clerical) separate and apart from that employed by the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude the employment by the D/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 D/M/WBE in accordance with customary industry practice. The routine transfer of work crews from another employer to the D/M/WBE shall not be allowed.

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

4. Equipment. D/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 contract, or their affiliates. If the D/M/WBE obtains equipment from any of those sources, the D/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.

F. Requests For Waiver. A potential bidder, defined as one who has purchased the contract documents, may request a waiver of all or part of a contract's D/M/WBE goal(s) by submitting a written request to the Office of Construction Civil Rights Unit. The request shall be submitted no later than 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(s), if necessary, in accordance with the Department's schedule for contract amendments. The request should contain sufficient justification as to why the goal(s) 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 D/M/WBEs for the work to be subcontracted.

G. Good Faith Efforts. To determine whether a bidder that has failed to meet the D/M/WBE contract goal(s) may receive the contract, the Department will decide whether the efforts the Bidder made to obtain D/M/WBE participation were "good faith efforts" to meet the goal(s). Efforts that are merely pro forma are not good faith efforts to meet the goal(s). Efforts to obtain D/M/WBE participation are not good faith efforts to meet the goal(s), even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of D/M/WBE participation sufficient to meet the goal(s). In order to award a contract to a bidder that has failed to meet the D/M/WBE contract goal(s), 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(s) 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. Below is a list of the types of actions which the Department will consider as part of the Bidder's good faith efforts to obtain D/M/WBE participation. It is not a mandatory checklist, nor is it intended to be exhaustive or exclusive.

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- 1.** Securing participation by certified D/M/WBE firms for work that they are listed to perform that is in the contract. Only DBEs certified by the NYS Unified Certification Program (NYSUCP) shall be used to fulfill the established goal on Federal-Aid contracts. Only M/WBEs certified by the NYS Department of Economic Development shall be used to fulfill the established goal(s) on non Federal-Aid 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 D/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 D/M/WBEs to respond to the solicitation. The Bidder shall determine with certainty if the D/M/WBEs are interested by taking appropriate steps to follow up on initial solicitations.
- 3.** The Bidder shall, at a minimum, seek certified D/M/WBEs in the same geographic area where the contract is located. For work such as pavement markings, guide rail, signs, etc. the Bidder shall, at a minimum, solicit on an upstate or downstate basis.
- 4.** Selecting portions of the work to be performed by D/M/WBEs in order to increase the likelihood that the D/M/WBE goal(s) will be achieved. This includes, where appropriate, either breaking down operations or combining like or related operations into logistically and economically feasible units to facilitate D/M/WBE participation, even when the Contractor might prefer to perform these work items with its own forces.
- 5.** Providing interested D/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 D/M/WBEs.* It is the Bidder's responsibility to make a portion of the work available to D/M/WBE Subcontractors and material suppliers and to select those portions of the work or material needs consistent with the available D/M/WBE Subcontractors and material suppliers, so as to facilitate D/M/WBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of D/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 D/M/WBEs to perform the work.

b. Additional Costs. The fact that there may be some additional costs involved in finding and using D/M/WBEs is not in itself sufficient reason for a bidder's failure to meet the contract D/M/WBE goal(s), 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 D/M/WBEs if the price difference is excessive or unreasonable.
- 7.** Not rejecting D/M/WBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.
- 8.** Making efforts to assist interested D/M/WBEs in obtaining bonding, lines of credit or insurance as required by the Department.
- 9.** Making efforts to assist interested D/M/WBEs in obtaining necessary equipment, supplies, materials, or related assistance.

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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 D/M/WBEs.

11. Keeping records of efforts to solicit and negotiate with D/M/WBEs as evidence of good-faith efforts, using the *Solicitation Log* as a continuing record of pre- and post-letting solicitation activity.

12. Promptly executing an agreement with D/M/WBE Subcontractors/vendors.

H. D/M/WBE Pre-Award Utilization Package. Within 7 calendar days after bid letting, the Apparent Low Bidder shall submit a complete D/M/WBE Pre-Award Utilization Package, as outlined below, to the Office of Construction using the Department approved civil rights reporting software. Commitment amounts by contract pay item shall be entered for all Subcontractors. Apparent Low Bidders that do not have access to the Department approved civil rights reporting software shall contact the Office of Construction for guidance on submission of the Utilization Package. As soon as practicable, but not later than prior to the first contract payment, the Contractor shall enter all current utilization data into the Department approved civil rights reporting software.

For each D/M/WBE Subcontractor, the Apparent Low Bidder shall indicate the contract pay item number(s) of the work to be performed. The Apparent Low Bidder shall explain, in writing, the scope of work to be performed by the D/M/WBE for any item which is not completely performed by the D/M/WBE Subcontractor. This does not include items for which the Contractor is performing less than the total contract quantity for that item.

For each D/M/WBE Manufacturer, Fabricator, Material Supplier, or Broker, the Apparent Low Bidder shall indicate the contract pay item number(s) of the material to be manufactured, fabricated, supplied, or otherwise provided. If the material, equipment or service does not correspond to a specific contract pay item, the Apparent Low Bidder shall use a contract pay item(s) to which the activity relates.

For each D/M/WBE Service, the Apparent Low Bidder shall indicate the contract pay item number(s) of the service to be provided. If the equipment or service does not correspond to a specific Department contract pay item, the Apparent Low Bidder shall use a contract pay item(s) to which the activity relates.

For each D/M/WBE Trucking Operation, the Apparent Low Bidder shall indicate the contract pay item number(s) for which the trucking operations are to be performed. If the trucking operation does not correspond to a specific contract pay item, the Apparent Low Bidder shall use a contract pay item(s) to which the activity relates. The Apparent Low Bidder shall indicate the type of trucking operation to be performed, the number of trucks owned/leased, the number of trucks working on-site or off-site, rate per hour/ton/load/etc., duration or amount, and total dollar value of the proposed D/M/WBE commitment. The Apparent Low Bidder shall provide copies of all lease agreements utilized by the D/M/WBE.

If the Apparent Low Bidder has met or exceeded the established D/M/WBE goal(s) for the contract utilizing certified D/M/WBEs it is not necessary to submit documentation of good faith efforts.

If the Apparent Low Bidder has not met the D/M/WBE goal(s), it shall submit the *Solicitation Log*, together with other documentation that substantiates good faith efforts. Such documentation shall include, at a minimum, all envelopes of solicitation inquiries that were returned as undeliverable and quotations submitted by D/M/WBEs that are not included in the *D/M/WBE Schedule of Utilization* with an explanation for the Bidder's action in each case.

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After contract award, the Contractor shall execute subcontracts or agreements with the D/M/WBEs for the type and amount of work identified in the approved D/M/WBE Utilization Package.

I. Bidder's Failure to Comply. The Department's acceptance of the Apparent Low Bidder's proposal is conditioned upon the Apparent Low Bidder's fulfillment of the D/M/WBE utilization requirements. If the Apparent Low Bidder fails to submit a complete D/M/WBE utilization package within 7 calendar days after the bid opening and/or fails to attain the D/M/WBE utilization goal(s) and to satisfactorily document its good faith efforts, the bid may be declared incomplete and the deposit may be subject to forfeiture pursuant to §103-02 *Execution of Contract*. The Apparent Low Bidder, upon receipt of written notification of its failure to comply with the D/M/WBE utilization requirements shall have 5 work 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, 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(s) 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(s) 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(s) or make adequate good faith efforts to do so.

Make the following changes to the Standard Specifications dated May 4, 2006:
Page 96-98 **Delete** §105-21 and **Replace** it with the following:

105-21 CIVIL RIGHTS MONITORING AND REPORTING. The Contractor shall use the current version of Department approved civil rights reporting software on all contracts. The Contractor shall submit complete, accurate, electronic data to the Department for each month, not later than the 15th of the following month, using the Department approved civil rights reporting software. Data shall be current through the end of the last full payroll week for that month, or as otherwise approved by the Engineer to coordinate with contract payment submittals.

A. Civil Rights Officer(s). The Contractor shall designate a Corporate Civil Rights Officer, a Corporate DBE Representative, and a contract site Equal Employment Opportunity (EEO) Representative who shall have the responsibility to and shall be capable of effectively administering and promoting an active contractor program of equal employment opportunity and who shall be assigned adequate authority and responsibility to do so. A single individual may fulfill multiple roles. The Contractor shall notify the Department within 30 calendar days of any changes in these roles.

B. Workforce Participation Plan. At the pre-construction meeting, the Contractor shall submit a *Workforce Participation Plan* covering the Contractor's workforce and the workforce of all its Subcontractors, together and coordinated with the contract progress schedule, that addresses the Equal Employment Opportunity goals.

The Contractor shall not start work until the Department and the Contractor have agreed upon has accepted the *Workforce Participation Plan*. The Contractor shall submit a revised plan when a significant work force build-up or reduction will substantially affect goal attainment, or when a revised schedule is requested by the Department. Such revised *Workforce Participation Plan* must be agreed upon by the Department or the original will remain in effect.

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C. Equal Employment Opportunity (EEO) Monitoring and Reporting. The Contractor's compliance with the EEO Requirements will be based on its Employment Utilization, affirmative action steps and its good faith efforts to meet the goals.

The Department, in evaluating the Contractor's good faith efforts to meet the EEO goal(s), will first analyze the Contractor's goal attainment on an individual contract. If the Contractor is not meeting the goal(s) for a single trade or contract, the Department will analyze, progressively, the Contractor's goal attainment on all contracts held by the Contractor within the county, the Region, and/or the State. This method of analysis shall be applied primarily but not solely to contracts with small population numbers. Other factors to be considered include, but are not limited to; the location of the contracts, the relative proximity of the contracts to each other, and the nature of the work.

1. Employee Utilization Data. The Contractor shall submit employee utilization data for its workforce and for each Subcontractor with a subcontract exceeding \$10,000 to the Department on a monthly basis showing hours worked for each payroll week, for each trade and classification, by gender and ethnicity. Employee utilization data shall include data from the start of the contract up to and including the month being reported. For the purpose of determining utilization percentages, the hours of female and minority employment shall be tabulated separately and attainment percentages calculated separately.

2. Federal-Aid Highway Construction Contractors Annual EEO Report. The Contractor shall submit all required data to produce an annual Form FHWA 1391 Federal-Aid Highway Construction Contractors Annual EEO Report to the Department not later than the second Friday in August covering the last payroll period worked in July, for all ongoing Federal-Aid contracts. The data shall indicate the number of minority men, minority women, non-minority men, and non-minority women employees currently engaged in each trade.

3. Monthly Training Progress Report. When training is required under §102-11 *Equal Employment Opportunity Requirements* and/or Training Special Provisions, the Contractor shall submit a monthly training progress report to the Engineer.

4. Contractor Compliance. If the Contractor fails to meet the EEO goal(s) for minorities or women, the Department may require training of minorities and women to satisfy the employment goals. If the Contractor fails to meet the EEO goal(s) or is in noncompliance with the nondiscrimination clauses, the Department may suspend additional contract payments in accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement, the Contractor may be directed to attend a hearing before the Contract Review Unit, or the Department may follow any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement.

The Contractor may also be referred to the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), which has the sole authority to determine compliance with Executive Order 11246 and its implementing regulations. OFCCP may declare the Contractor ineligible for further Federal-Aid contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246, or by rule, regulation, or order of the U.S. Secretary of Labor, or as otherwise provided by law.

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D. D/M/WBE Monitoring and Reporting. The Engineer will monitor the work to ensure that the identified D/M/WBEs perform the work as identified in the Contractor's commitments. Attainments will be measured based on payments made to D/M/WBEs. Attainments based on work completed by D/M/WBEs that are no longer certified will not be counted after the D/M/WBE is no longer certified.

1. Report of Payments to Subcontractors and D/M/WBEs. The Contractor shall report payments made to all Subcontractors and all D/M/WBEs, in order to measure goal attainment and to gauge the effect of D/M/WBE goal(s) on the industry. The Contractor shall submit payment data for all Subcontractors and for all D/M/WBEs approved by the Department that are due a payment or have received a payment within the last month. The Subcontractor or D/M/WBE shall acknowledge payment not later than 15 calendar days after receipt.

2. Revisions to D/M/WBE Utilization. The Contractor shall obtain Department approval for significant revisions in D/M/WBE utilization prior to implementing any proposed change through submission of a revised *D/M/WBE Utilization Worksheet* using the Department approved civil rights reporting software.

The following modifications will be considered a significant revision in D/M/WBE utilization:

1. Adding, removing or substituting a D/M/WBE.
2. Adding new item(s) of work to a D/M/WBE within a core (3 digit) contract pay item number (i.e. 606 – Guide Railing) not currently approved.
3. Significantly reducing the dollar value of or eliminating the D/M/WBE's item(s) of work. Significant reduction will be determined by comparison to the total D/M/WBE contract goal.

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 D/M/WBE's work or the removal of the D/M/WBE, including for reasons of commercially useful function violations, causes the D/M/WBE utilization to fall below the goal(s), the Contractor shall make good faith efforts to find another D/M/WBE to substitute for the original D/M/WBE to perform at least the same amount of work as the D/M/WBE that was terminated, to the extent needed to meet the contract goal(s).

A D/M/WBE may be substituted if its intended work is deleted or reduced by the Department and enough work remains to substitute an equal amount to the affected D/M/WBE. If not enough work remains, the Department may relieve the Contractor from attaining that portion of the goal(s).

The following modifications will not be considered a significant revision in D/M/WBE utilization:

1. Increasing the dollar value of an item(s) of work or adding new item(s) of work within the same core (3 digit) contract pay item number (i.e. 606 – Guide Railing) to a D/M/WBE.
2. Substituting similar dollar values of work within a currently approved core (3 digit) contract pay item number (i.e. 606 – Guide Railing).

3. Contractor Compliance. If the Contractor fails to meet the D/M/WBE utilization goal(s), to exert a good faith effort, or otherwise fails to comply with the D/M/WBE requirements, the Department may take further actions, as follows:

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a. *DBE Program.* The Department may suspend contract payments in accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement, the Contractor may be directed to attend a hearing before the Contract Review Unit, or the Department may follow any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement. 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.

b. *M/WBE Program.* The Department may suspend contract payments in accordance with Article 8 *No Payment on Contractor's Non-Compliance* of the contract agreement, the Contractor may be directed to attend a hearing before the Contract Review Unit, or the Department may follow any other lawful procedure upon due notice in writing to the Contractor, including cancellation, termination, or suspension in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement. The Department may file a complaint with the NYS Department of Economic Development, Division of Minority and Women's Business Development pursuant to Executive Law Article 15A, or 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.

E. Compliance Reviews. A compliance review consists of a thorough review of all civil rights contract requirements, including non-discrimination in Labor/Employment, EEO, Training, and DBE requirements. The Department conducts annual compliance reviews of selected federal-aid contracts. A Contractor will typically not be selected for more than two compliance reviews per year statewide. Based on contract monitoring and/or the results of compliance review(s), the Department may conduct a review of some or all ongoing contracts with a single Contractor, regardless of funding source.