

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ADMINISTRATION  
OFFICE OF DIVERSITY, EQUITY AND OPPORTUNITY  
MBE COMPLIANCE OFFICE

**NOTICE OF RULEMAKING & PUBLIC COMMENT HEARING  
CONCERNING PROPOSED**

*“REGULATIONS GOVERNING PARTICIPATION BY SMALL BUSINESS ENTERPRISES IN STATE  
PURCHASES OF GOODS AND SERVICES AND PUBLIC WORKS PROJECTS”*

Notice is hereby given regarding the intent of the Office of Diversity, Equity and Opportunity (“ODEO”) to repeal ERLID # 716, entitled *“Regulations Governing Participation by Minority Business Enterprises in State Funded and Directed Public Construction Projects, Construction Contracts, and Procurement Contracts for Goods and Services”*, and re-promulgate and adopt a new regulation entitled *“Regulations Governing Participation by Small Business Enterprises in State Purchase of Goods and Services and Public Works Projects.”* In addition to written comments being accepted until February 8, 2017, ODEO will facilitate a public comment hearing to accept oral comments which will be held in **Conference Room A, Second Floor, of the William Powers Building, One Capitol Hill, Providence, Rhode Island on Monday, January 23, 2017 at 2:00 PM** at which time interested parties will be heard.

These rules and regulations are promulgated pursuant to the authority provided by Rhode Island General Laws, Chapter 37-14.1-5 and Chapter 37-2.2 - 3.1(b), as amended, in accordance with Rhode Island General Laws 42-35, the Administrative Procedures Act. ODEO will accept public comments on the proposed regulatory amendments pertaining to the participation of small business enterprises in the state purchase of goods and services and on public works projects.

The purpose of the amendments is to encourage the maximization of participation of minority business enterprises (“MBEs”), women business enterprises (“WBEs”), and disability business enterprises in state procurement activities. Substantive revisions include 1) the creation of a Points System for Requests for Proposals that will include an evaluation criterion for participation of minority business enterprises, women business enterprises, and disability business enterprises, and 2) revisions to the bidder requirements for Requests for Quotations that will require the submission of an MBE/WBE Compliance Plan within five (5) business days of receipt of a tentative selection.

In the development of the amended rules, consideration was given to: 1) alternative approaches; 2) overlap or duplication with other rules, and 3) significant economic impacts on small businesses. Copies of the proposed amendments along with a concise summary of all non-technical amendments being proposed are filed with the Secretary of State's Office.

The proposed revisions in hardcopy are available for review at the Department of Administration, Office of Diversity, Equity and Opportunity, MBE Compliance Office, One Capitol Hill, 3<sup>rd</sup> Floor, Providence, RI between 8:30 a.m. and 4:00 p.m., Monday through Friday, or by calling Dorinda Keene at (401) 574-8670, or by sending an email to: [Dorinda.keene@doa.ri.gov](mailto:Dorinda.keene@doa.ri.gov) .

Written comments on the proposed regulations may also be sent by email to [Dorinda.keene@doa.ri.gov](mailto:Dorinda.keene@doa.ri.gov) or by regular mail to:

The Office of Diversity, Equity and Opportunity, MBE Compliance Office  
Attn: Dorinda Keene  
One Capitol Hill, 3<sup>rd</sup> Floor  
Providence, RI 02908

Written comments will be accepted until **4:00 PM on Wednesday, February 8, 2017**. It is requested that person(s) who wish to make oral comments during the public hearing submit a copy of their statement for the record. All oral and written comments will be considered in the same manner.

This meeting place is accessible to individuals with disabilities. Any individual requiring a reasonable accommodation in order to participate in this meeting should contact Thomas Mannock, Ph.D. at 222-

6395 (voice) or #711 (R.I. Relay) at least five (5) business days prior to the meeting. Any individual requiring the services of an interpreter to participate in this meeting should contact Dorinda Keene at 574-8670 (voice) as soon as possible.

Signed this \_\_\_\_\_ day of January, 2017



/s/ \_\_\_\_\_

Michael DiBiase, Director of Administration

150-RICR-90-10-1

## TITLE 150 – DEPARTMENT OF ADMINISTRATION

### CHAPTER 90 – DIVERSITY, EQUITY, AND OPPORTUNITY

#### SUBCHAPTER 10 – MINORITY BUSINESS ENTERPRISE

##### PART 1 – REGULATIONS GOVERNING PARTICIPATION BY SMALL BUSINESS ENTERPRISES IN STATE PURCHASES OF GOODS AND SERVICES AND PUBLIC WORKS PROJECTS

### 1.1 Authority

- A. The Regulations published herein have been approved and established by the Director of Administration pursuant to R.I. Gen. Laws §§ 37-14.1-6, 37-14.1-7, and 37-2.2-3.1 and have been promulgated by the Department of Administration in accordance with the “Administrative Procedures Act”, R.I. Gen. Laws Ch. 42-35.

### 1.2 Purpose

- A. To support the fullest possible participation of businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities in State public works projects and in State purchases of goods and services.

### 1.3 Scope

- A. All State Agencies as defined herein shall comply with these Regulations; provided, however, that pursuant to R.I. Gen. Laws §§ 37-14.1-7 and 37-14.1-8 the Director of the Department of Transportation has received delegated authority to adopt regulations consistent with R.I. Gen. Laws Ch. 37-14.1 thereby exempting the Department of Transportation from the requirements of these Regulations.

### 1.4 Waivers

- A. The Director of Administration may waive strict application of these Regulations when it has been determined in writing that the Proposer or Bidder must satisfy requirements of federal law which achieve the goals and purpose of these Regulations. The Director must provide written notice of any waiver to the ODEO and the Governor’s Commission on Disabilities. All such notices shall be available for public inspection.

### 1.5 Severability

- A. If any part or provision of these Regulations or the application of any part or provision to any person, entity, or circumstances is judged invalid by any court of competent jurisdiction, the judgment shall be confined in its operation to the part of or provision of or application directly involved in the controversy in which the judgment has been rendered and shall not affect or

impair the validity of the remainder of these Regulations or its applications to other persons, entities, or circumstances.

## 1.6 Definitions

A. The following words and terms shall have the following meanings whenever used in these Regulations.

1. “Aggregate Utilization Rate” means the overall percentage goal of the State’s total dollar value of procurement contracts and public works projects being made directly or indirectly to MBEs/WBEs.
2. “Associate Director of ODEO” means the head of the ODEO as established by R.I. Gen. Laws § 42-11-2.7(b).
3. “Bidder” means any individual, organization, corporation, partnership, sole proprietorship, joint stock company, joint venture, or any other legal entity through which business is conducted that is submitting a quote or bid in response to a solicitation issued by the Division of Purchases or any other State Agency.
4. “Disability Business Enterprise” means a small business concern that is owned and controlled by one or more individuals with disabilities as defined by R.I. Gen. Laws § 37-2.2-2. To be recognized under these Regulations as a Disability Business Enterprise, the business must be certified as a Disability Business Enterprise by the Governor’s Commission on Disabilities.
5. “Director” means the Director of the Department of Administration. The Director may delegate his or her duties under these Regulations to a designee provided that the issuance of any waivers from or amendments to these Regulations must be approved in writing by the Director.
6. “Division” means the Department of Administration’s Division of Purchases. If the solicitation is not issued by the Division of Purchases, then Division shall mean the division or department within the State Agency that is issuing the solicitation.
7. “ISBE” means a small business enterprise that is owned and controlled by one or more individuals who are women or minorities as defined by R.I. Gen. Laws § 37-14.1-3 or a small business enterprise that is owned and controlled by one or more individuals with disabilities as defined by R.I. Gen. Laws § 37-2.2-2. To be recognized under these Regulations as an ISBE, the business must be certified as either:
  - a. an MBE by the ODEO;
  - b. a WBE by the ODEO; or
  - c. a Disability Business Enterprise by the Governor’s Commission on Disabilities
8. “ISBE Participation Rate” means the ratio of the amount of work performed in connection with a State procurement contract or public works project by ISBEs to the amount of work performed by all contractors and subcontractors.

9. "MBE/WBE Compliance Plan" is a Bidder's plan to achieve the Aggregate Utilization Rate in connection with a State procurement contract or public works project.
10. "MBE/WBE Coordinator" means a State Agency's MBE coordinator as defined by R.I. Gen. Laws § 37-14.1-3(g). The MBE/WBE Coordinator is to have overall responsibility for promotion of MBEs and WBEs within his or her department.
11. "MBECO" means the Minority Business Enterprise Compliance Office within the ODEO.
12. "Minority Business Enterprise" or "MBE" means a small business enterprise that is owned and controlled by one or more individuals who are minorities as defined by R.I. Gen. Laws § 37-14.1-3. To be recognized under these Regulations as an MBE, the business must be certified as an MBE by the ODEO.
13. "ODEO" means the Office of Diversity, Equity and Opportunity that has been established as a division with the Department of Administration pursuant to R.I. Gen. Laws § 42-11-2.7.
14. "Proposer" means any individual, organization, corporation, partnership, sole proprietorship, joint stock company, joint venture, or any other legal entity through which business is conducted that is submitting a proposal in response to a solicitation issued by the Division of Purchases or any other State agency.
15. "Regulations" means the regulations published herein which are entitled Regulations Governing Participation by ISBEs in State Purchases of Goods and Services and Public Works Projects.
16. "Request for Proposals" or "RFP" means a solicitation for competitive offers where lowest price is not the sole or primary consideration to be used in determining an award or any other solicitation that is identified and classified by the Division as a request for proposals.
17. "Request for Quotes" or "RFQ" means a solicitation for competitive offers where lowest price is the sole or primary consideration to be used in determining an award or any other solicitation that is identified and classified by the Division as a request for quotes.
18. "State" means the state of Rhode Island and any of its departments or agencies and public agencies.
19. "State Agency" includes any state department, board, bureau, agency, or public agency as defined by R.I. Gen. Laws § 37-2-7(16).
20. "Sub Goal" means a percentage goal of the total dollar value of a State procurement contract or public works project being made directly or indirectly to a subcategory of MBEs/WBEs.
21. "Using Agency" means any state government entity which utilizes any supplies, services, or construction purchased under R.I. Gen. Laws Ch. 37-2.
22. "Woman Business Enterprise" or "WBE" means a small business enterprise that is owned and controlled by one or more individuals who are women as defined by R.I. Gen. Laws §

37-14.1-3. To be recognized under these Regulations as a WBE, the business must be certified as a WBE by the ODEO.

## 1.7 Request for Proposals

A. This section applies whenever the Division or a State Agency seeks to procure goods, services, and/or public works projects through the issuance of an RFP.

### B. ISBE Participation Criterion

1. **Criterion.** All RFP solicitations for goods, services, and/or public works projects must include a criterion for ISBE participation.
2. **Weight.** The standard weight for the ISBE participation criteria shall be 6 points out of a total of 106 evaluation points available to the Proposers.
3. **Periodic Review.** The ODEO shall periodically review the standard weight for the ISBE participation criterion.

### C. Calculation of ISBE Participation Rate

1. **ISBE Participation Rate for Proposer That Is Not an ISBE.** The ISBE Participation Rate for a Proposer that is not an ISBE shall be expressed as a percentage and shall be calculated by dividing the Proposer's total contract price that is subcontracted to ISBEs for work performed by ISBEs by the Proposer's total contract price. For example if the Proposer's total contract price is \$100,000.00 and it subcontracts a total of \$12,000.00 to ISBEs, the Proposer's ISBE Participation Rate would be 12%. In the event an RFP does not request a total contract price, the ISBE Participation Rate for a Proposer that is not an ISBE shall be expressed as a percentage and shall be determined as specified by the RFP.
2. **ISBE Participation Rate for Proposer That Is an ISBE.** The ISBE Participation Rate for a Proposer that is an ISBE shall be expressed as a percentage and shall be calculated by dividing the sum of the Proposer's total contract price that is subcontracted to ISBEs for work performed by ISBEs and the Proposer's total contract price that is performed by the Proposer itself by the Proposer's total contract price. For example if the Proposer's total contract price is \$100,000.00 and it subcontracts a total of \$12,000.00 to ISBEs and will perform a total of \$8,000.00 of the work itself as an ISBE, the Proposer's ISBE Participation Rate would be 20%. In the event an RFP does not request a total contract price, the ISBE Participation Rate for a Proposer that is an ISBE shall be expressed as a percentage and shall be determined as specified by the RFP.

D. **MBE/WBE Coordinator.** For each RFP issued, the Using Agency shall designate an MBE/WBE Coordinator no later than the time the RFP is issued. For each RFP assigned to him or her, the MBE/WBE Coordinator shall be responsible for compliance oversight and tracking and recordkeeping all data and information that is required to be reported by each State Agency under Section 1.11.

### E. Proposer's Responsibilities

1. **Proposal of ISBE Participation Rate.** Unless otherwise indicated in the RFP, a Proposer must submit its proposed ISBE Participation Rate in a sealed envelope or via

sealed electronic submission at the time it submits its proposed total contract price. The Proposer shall be responsible for completing and submitting all standard forms adopted pursuant to Section 1.9 and submitting all substantiating documentation as reasonably requested by either the Using Agency's MBE/WBE Coordinator, Division, ODEO, or Governor's Commission on Disabilities including but not limited to the names and contact information of all proposed subcontractors and the dollar amounts that correspond with each proposed subcontract.

2. **Failure to Submit ISBE Participation Rate.** Any Proposer that fails to submit a proposed ISBE Participation Rate or any requested substantiating documentation in a timely manner shall receive zero (0) ISBE participation points.
3. **Execution of Proposed ISBE Participation Rate.** Proposers shall be evaluated and scored based on the amounts and rates submitted in their proposals. If awarded the contract, Proposers shall be required to achieve their proposed ISBE Participation Rates. During the life of the contract, the Proposer shall be responsible for submitting all substantiating documentation as reasonably requested by the Using Agency's MBE/WBE Coordinator, Division, ODEO, or Governor's Commission on Disabilities including but not limited to copies of purchase orders, subcontracts, and cancelled checks.
4. **Change Orders.** If during the life of the contract, a change order is issued by the Division, the Proposer shall notify the ODEO of the change as soon as reasonably possible. Proposers are required to achieve their proposed ISBE Participation Rates on any change order amounts.
5. **Notice of Change to Proposed ISBE Participation Rate.** If during the life of the contract, the Proposer becomes aware that it will be unable to achieve its proposed ISBE Participation Rate, it must notify the Division and ODEO as soon as reasonably possible. The Division, in consultation with ODEO and Governor's Commission on Disabilities, and the Proposer may agree to a modified ISBE Participation Rate provided that the change in circumstances was beyond the control of the Proposer or the direct result of an unanticipated reduction in the overall total project cost.

F. **Awarding ISBE Participation Points**

1. **Technical Viability.** A Proposer's proposed ISBE participation shall only be considered when the Proposer's proposed price is considered. A Proposer that does not have its proposed price considered because it failed to attain the requisite minimum technical score or otherwise failed to meet all technical requirements shall not have its proposed ISBE participation considered.
2. **Points for ISBE Participation Rate.** The Proposer with the highest ISBE Participation Rate shall receive the maximum ISBE participation points. All other Proposers shall receive ISBE participation points by applying the following formula:

The Proposer's ISBE Participation Rate

÷

The highest ISBE Participation Rate

X

### The maximum ISBE participation points

For example, assuming the weight given by the RFP to ISBE participation is 6 points, if Proposer A has the highest ISBE Participation Rate at 20% and Proposer B's ISBE Participation Rate is 12%, Proposer A will receive the maximum 6 points and Proposer B will receive  $(12\% \div 20\%) \times 6$  which equals 3.6 points.

- G. **Compliance.** A Proposer that achieves its contractual proposed ISBE Participation Rate shall be deemed to be in compliance with R.I. Gen. Laws Ch. 37-14.1 and R.I. Gen. Laws Ch. 37-2.2. A Proposer that fails to achieve its contractual proposed ISBE Participation Rate, refuses to submit a proposed ISBE Participation Rate, or otherwise fails to comply with these Regulations shall be in non-compliance with R.I. Gen. Laws Ch. 37-14.1 and R.I. Gen. Laws Ch. 37-2.2 and shall be subject to the sanctions as prescribed in R.I. Gen. Laws § 37-14.1-8.

## 1.8 Request for Quotes

- A. This section applies whenever the Division or a State Agency seeks to procure goods, services, and/or public works projects through the issuance of an RFQ.
- B. **Aggregate Utilization Rate.** The Aggregate Utilization Rate is ten percent (10%) provided that, in the event the percentage set forth by R.I. Gen. Laws § 37-14.1-6 is amended, the Aggregate Utilization Rate herein shall also be amended so that it always reflects the percentage set forth by R.I. Gen. Laws § 37-14.1-6.
- C. **Sub Goals.** With the approval of the Director, the ODEO may establish Sub Goals. Sub Goals shall not be approved unless the ODEO demonstrates that the Sub Goals are consistent with underutilization data received through a disparity study and/or pertinent analytic data derived from the recordkeeping of State Agencies.
- D. **State Agency Responsibilities**
1. **MBE/WBE Coordinator.** For each RFQ issued, the Using Agency shall designate an MBE/WBE Coordinator no later than the time the RFQ is issued. For each RFQ assigned to him or her, the MBE/WBE Coordinator shall be responsible for compliance oversight and tracking and recordkeeping all data and information that is required to be reported by each State Agency under Section 1.11.
  2. **Agency Procedures.** Each State Agency shall attempt to achieve the Aggregate Utilization Rate by applying one of the two methods as described in Section 1.8(D)(3) and Section 1.8(D)(4) below.
  3. **Prime Contractor Method.** For each procurement where Bidders will be serving as a prime contractor, the Using Agency shall ensure that it tries to achieve, at a minimum, the Aggregate Utilization Rate. The Using Agency shall ensure that the Bidder either meets or exceeds this requirement or has been granted a good faith waiver.
  4. **No Prime Contractors.** In lieu of using the prime contractor method described in Section 1.8(D)(3) above, the Using Agency may meet the Aggregate Utilization Rate by ensuring that the rate is met in the aggregate for each fiscal year. MBEs/WBEs may be solicited directly to accomplish this requirement.



5. **Compliance with Sub Goals.** In the event Sub Goals are established by the ODEO, State Agencies must track all data and keep records relating to the established Sub Goals.

**E. Bidder Responsibilities**

1. **Acknowledgement.** A Bidder shall include with its bid or quote, a statement acknowledging the provisions of R.I. Gen. Laws Ch. 37-14.1 and its obligation to meet the Aggregate Utilization Rate. Satisfying this requirement means that a minimum of the Aggregate Utilization Rate of the total dollar value of work to be performed in relation to the procurement will be performed by certified MBEs/WBEs. If a Bidder is an MBE/WBE, it may satisfy this requirement by performing a minimum of the Aggregate Utilization Rate of the total dollar value of work itself.
2. **Submission of MBE/WBE Compliance Plan.** Bidders must submit an MBE/WBE Compliance Plan to the Division. The MBE/WBE Compliance Plan shall identify each MBE/WBE name, each subcontract dollar amount and type, and each subcontract that the Bidder projects will be awarded to MBEs/WBEs over the period of the project. Unless otherwise indicated in the solicitation, the Bidder must submit this MBE/WBE Compliance Plan within five business days of receipt of a tentative award issued by the Division.
3. **MBE/WBE Liaison Officer.** The chief executive officer of each Bidder shall designate an MBE/WBE liaison officer who shall be responsible for coordinating with the ODEO, Division and the Using Agency through the life of the contract.

**F. Approval or Disapproval of MBE/WBE Plan**

1. **Review.** The MBECO shall review MBE/WBE Compliance Plans. Any MBE/WBE Compliance Plan that reasonably ensures compliance with the Aggregate Utilization Rate requirement shall be approved.
2. **Impossibility of Compliance.** Where the Bidder has proved that for reasons beyond its control, compliance with the Aggregate Utilization Rate requirement is impossible, the MBECO may approve an MBE/WBE Compliance Plan that ensures compliance with an MBE/WBE utilization rate of less than the Aggregate Utilization Rate. To prove impossibility of compliance, the Bidder must demonstrate the following:
  - a. The Bidder is making all appropriate good faith efforts as listed in Section 1.8(G)(4) to increase MBE/WBE participation to the Aggregate Utilization Rate level.
  - b. Despite the Bidder's efforts, the Bidder's MBE/WBE Compliance Plan represents a reasonable exception to the Aggregate Utilization Rate due to valid reasons such as the lack of availability and/or willingness of qualified MBEs/WBEs to work on the contract.
3. **Revised Plan.** If the MBECO does not approve the MBE/WBE Compliance Plan that the Bidder has initially submitted, the Bidder, after consulting with the MBECO, shall present a revised plan to the MBECO for review.
4. **Reconsideration.** Within five business days of having its MBE/WBE Compliance Plan denied by the MBECO, the Bidder may appeal to the Associate Director of ODEO for

reconsideration. All appeals must be in writing and addressed to the Associate Director of ODEO, One Capitol Hill, 3<sup>rd</sup> Floor, Providence, RI 02908. A written reconsideration decision will be issued by the Associate Director of ODEO within thirty (30) business days of receipt provided that the Associate Director of ODEO may extend such time upon good cause.

5. **Failure to Have an Approved Plan.** A Bidder's failure to have an approved MBE/WBE Compliance Plan constitutes non-compliance with the provisions of R.I. Gen. Laws Ch. 37-14.1.

G. **Continuing Disclosure**

1. **On-Site Inspections.** The Division, ODEO and the Using Agency's MBE/WBE Coordinator are permitted to periodically conduct on-site inspections to determine compliance with the provisions of R.I. Gen. Laws Ch. 37-14.1 and Section 1.8. The Division, ODEO, or the Using Agency's MBE/WBE Coordinator may require a Bidder to furnish copies of purchase orders, subcontracts, cancelled checks, and other records needed to substantiate a Bidder's compliance with its approved MBE/WBE Compliance Plan.
2. **Change Orders.** If during the life of the contract or project, a change order is issued by the Division, the Proposer shall notify the ODEO of the change as soon as reasonably possible. Proposers must submit to the ODEO a revised MBE/WBE Compliance Plan consistent with achieving the Aggregate Utilization Rate on any change order amounts.
3. **Notice of Failure.** If a Bidder fails to meet the requirements outlined in its approved MBE/WBE Compliance Plan, it shall explain to the Division, in writing, why the requirements could not be met and why meeting the requirement was beyond the Bidder's control.
4. **Good Faith Waivers.** The Division in consultation with the ODEO may issue a good faith waiver which shall exempt the Bidder from meeting its MBE/WBE requirements. To determine whether a Bidder has a good faith reason for failing to meet its requirements, the Division may consider, among other factors:
  - a. Whether the Bidder attended any pre-solicitation or pre-bid meetings that were scheduled by the Division to inform MBEs/WBEs of contracting or subcontracting opportunities;
  - b. Whether the Bidder advertised in general circulation, trade association, and minority focus media concerning the subcontracting opportunities;
  - c. Whether the Bidder provided written notice to a reasonable number of specific MBEs/WBEs that their interest in a contract was being solicited, in sufficient time to allow the MBEs/WBEs to participate;
  - d. Whether the Bidder followed up with MBEs/WBEs that showed an initial interest by contacting the firms to determine whether they were interested;
  - e. Whether the Bidder selected portions of work to be performed by MBEs/WBEs in order to increase the likelihood of meeting MBE/WBE participation requirements

(including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE/WBE participation);

- f. Whether the Bidder provided interested MBEs/WBEs with adequate information about the plans, specifications and requirements of the contract;
- g. Whether the Bidder negotiated in good faith with interested MBEs/WBEs;
- h. Whether the Bidder made suggestions to interested MBEs/WBEs to assist them in obtaining bonding, lines of credit, or insurance required by the Bidder;
- i. Whether the Bidder effectively used the services of available minority community organizations, minority contractors' groups, local, state, and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs/WBEs.

5. **Remedial Action.** If the Bidder does not make such an explanation, or if the Division determines that the Bidder's explanation does not justify its failure to meet the requirements in its approved MBE/WBE Compliance Plan, the Division may direct the Bidder to take appropriate remedial action. Failure to take remedial action directed by the Division constitutes non-compliance with the provisions of R.I. Gen. Laws Ch. 37-14.1 and the Bidder shall be subject to the sanctions as prescribed in R.I. Gen. Laws § 37-14.1-8.

H. **Concurrent Compliance with Federal Law.** The Aggregate Utilization Rate requirements set forth in Section 1.8 can be satisfied concurrently with similar requirements mandated under federal law.

I. **Exceeding Lowest Bid by Five Percent.** Nothing in Section 1.8 shall be construed to require the award of a contract to an MBE/WBE whose bid exceeds the lowest bid by five percent (5%). Nothing in Section 1.8 shall be construed to require the acceptance of non-conforming goods or services.

## 1.9 Standard Forms

A. The ODEO in consultation with the Division and the Governor's Commission on Disabilities is authorized to develop, adopt, and publish uniform documents and standard forms as the ODEO deems appropriate to ensure consistency in effectuating these Regulations.

## 1.10 RFP/RFQ Language

A. All solicitations covered by these Regulations should include language that references R.I. Gen. Laws Ch. 37-14.1 and R.I. Gen. Laws Ch. 37-2.2.

## 1.11 Recordkeeping

A. State Agencies shall keep records relating to the utilization of ISBEs for each of their solicitations and resulting contracts. The records shall include at a minimum the name of the Proposer or Bidder that is awarded the contract, the name of each ISBE that subcontracts with the Proposer or Bidder, the subcategory of each ISBE (i.e. WBE, MBE, Disability Business Enterprise), any

additional MBE/WBE subcategories that have established Sub Goals, the dollar value that corresponds with each subcontract, the Proposer's proposed ISBE Participation Rate, the Bidder's proposed MBE/WBE utilization rate as indicated in the Bidder's approved MBE/WBE Compliance Plan, the Proposer's actual ISBE Participation Rate, and the Bidder's actual MBE/WBE utilization rate. State agencies shall complete and submit all standard forms adopted pursuant to Section 1.9 and shall report such information to the ODEO and the Governor's Commission on Disabilities on an annual basis or as requested by the ODEO or the Governor's Commission on Disabilities.

## **1.12 Amendments**

- A. The Regulations may be rescinded or amended from time to time with the approval of the Director. Any amendments must be promulgated by the Department of Administration on behalf of the Director in accordance with the "Administrative Procedures Act", R.I. Gen. Laws Ch. 42-35.

~~REGULATIONS GOVERNING PARTICIPATION BY MINORITY BUSINESS ENTERPRISES IN STATE  
FUNDED AND DIRECTED PUBLIC CONSTRUCTION PROJECTS, CONSTRUCTION CONTRACTS  
AND PROCUREMENT CONTRACTS FOR GOODS AND SERVICES~~

~~I. **GENERAL**~~

~~1. **Purpose**~~

~~(a) The purpose of these regulations is to carry out the state's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women (MBEs) in state-funded and directed public construction programs and projects and in state purchases of goods and services. This includes assisting MBEs throughout the life of contracts in which they participate.~~

~~(b) These regulations implement, in part, R. I. Gen. Laws, Chapter 37-14.1. These regulations are effective immediately and supersede all Department of Administration regulations issued previously under these authorities insofar as such regulations affect minority business enterprise matters in the State.~~

~~2. **Applicability**~~

~~These regulations apply to any construction project, construction contract or procurement contract for goods and services funded in whole or in part by state funds, or funds which, in accordance with federal grant or otherwise, the state expends or administers or in which the state is a signatory. Quasi-independent state agencies, such as the Rhode Island Public Buildings Authority, the Narragansett Bay Commission and the Rhode Island Port Authority, are subject to the requirements outlined under these regulations. With respect to Department of Transportation contracts, The Director of Transportation may promulgate regulations consistent with R. I. Gen. Laws Sections 37-14.1-8 and 37-14.1-9, thereby exempting Department of Transportation contracts from the requirements of these regulations.~~

~~3. **Definitions**~~

~~The terms "building" or "work" means construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include, without limitation, buildings, structures, and improvement of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, scaffolding, drilling, blasting, excavating, clearing and landscaping. Unless conducted in connection with and at the site of such a building or work as described in the foregoing sentence, the manufacture or furnishing of materials, articles, supplies, or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of these regulations.~~

~~**"Compliance"** means the conditions existing when a prime contractor has met and implemented the requirements of these regulations.~~

~~**"Construction"** means all types of on-site work done on a particular building or work, including, without limitation, altering, remodeling, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction~~

subcontractor, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, by persons employed at the site by the contractor or subcontractor.

**"Construction Project"** means a contract or group of contracts for construction work that a prime contractor has agreed to perform, whether directly or through the use of subcontractors.

**"Contract"** means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of these regulations, a lease is a contract.

**"Contractor"** means one who participates, through a contract or subcontract, in any program covered by these regulations and includes lessees.

**"Director"** means the Director of the Department of Administration or any person whom he/she has designated to act for him/her.

**"Goods"** means materials or supplies of any kind provided by a vendor, his agents or employees.

**"Services"** means professional or non-professional activities requiring mental or physical labor to be performed by the contractor, vendor, his agents or employees.

**"Minority"** means a person who is a citizen or lawful permanent resident of the United States and who is:

- (a) Black (a person having origins in any of the black racial groups of Africa);
- (b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race);
- (c) Portuguese (a person of Portuguese, Brazilian or other Portuguese culture or origin, regardless of race);
- (d) Asian American (a person having origins in any of the original peoples of the Far East, South East Asia, the Indian Subcontinent, or the Pacific Islands);
- (e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America); or
- (f) Members of other groups or other individuals found to be economically and socially disadvantaged by the Small Business Administration under Section 8(a) of the Small Business Act, as amended (15 U.S.C. 637 (a)).

**"Minority Business Enterprise"** or "MBE" means a small business concern as defined pursuant to Section 3 of the Federal Small Business Act and implementing regulations, which is owned and controlled by one (1) or more minorities or women and which has been certified as a Minority Business Enterprise under these regulations by the Rhode Island Department of Administration. For the purposes of these regulations, an owned and controlled business means one:

- (a) which is at least 51% owned by one (1) or more minorities or women or, in the case of a publicly owned business, at least fifty-one percent (51%) of the stock of which is owned by one (1) or more minorities or women; and

~~(b) whose management and daily business operations are controlled by one (1) or more such individuals.~~

~~"MBE Coordinator" means the official designated to have overall responsibility for promotion of minority business enterprises within each department and agency for each contract covered by these regulations. He or she shall be appointed not later than the time the Request for Proposal for each contract is submitted.~~

~~"Non-compliance" means the condition existing when a contractor has failed to implement the requirements of these regulations.~~

~~"Prime Contractor" means the contractor that is charged with total construction on a contract or group of contracts, portions of which are, or will be subcontracted to their parties.~~

~~"Specialty Contractor" means a contractor charged with total construction on a contract or group of contracts, portions of which will not be subcontracted to third parties.~~

~~"Vendor" means the party with which the State contracts to provide goods or services.~~

#### 4. Policy

~~These regulations shall be construed in accordance with the policy of the State of Rhode Island that minority business enterprises (MBEs) shall have the maximum opportunity to participate in the performance of projects or provision of goods or services outlined hereunder.~~

#### 5. Construction Contracts

##### (a) MBE Liaison Officer

~~The chief executive officer of each prime contractor shall designate an MBE Liaison Officer who will coordinate with the MBE Coordinator from the Department of Administration or other state department or agency responsible for monitoring the contract.~~

##### (b) Ten Percent (10%) Requirement

~~(i) Each Department shall structure its procedures for procuring construction contracts to attempt to achieve the result that a minimum of ten (10%) percent of the total dollar value of these procurements is made directly or indirectly from MBEs. This result shall be achieved through one of the two methods described in paragraphs 5(b) (ii) or 5 (b) (iii) below.~~

~~(ii) Prime Contractor Method. Each prime contractor shall ensure that a minimum of ten percent (10%) of the dollar value of work to be performed on a construction project will be performed by MBEs. The prime contractor must meet or exceed this requirement or demonstrate that it could not meet this requirement despite its good faith efforts. A prime contractor that is an MBE will satisfy the ten percent (10%) requirement by ensuring that a least ten percent (10%) of the dollar volume of work performed under the contract is performed by its employees.~~

~~(iii) Construction Contracts not involving the use of prime contractors. In lieu of using the prime contractor method described in paragraph 5(b) (ii) above, a Department may meet the ten percent (10%) requirement under these regulations by ensuring that ten percent (10%) of the dollar value of construction contracts in the aggregate for each fiscal year is awarded to MBEs. MBEs may be solicited directly to accomplish this requirement.~~

~~(iv) The ten percent (10%) requirements set forth under these regulations can be satisfied concurrently with similar requirements mandated under federal law.~~

~~(v) Nothing in these regulations shall be construed to require the award of a contract to an MBE whose bid exceeds the lowest bid by five percent (5%). Nothing in these Regulations shall be construed to require the acceptance of non-conforming goods or services.~~

~~(c) Solicitation of Bids~~

~~All departments and agencies soliciting requests for proposals for construction projects identified as having subcontracting opportunities must include in the advertisements for the project the following language: "This project is subject to Chapter 37-14.1 of the Rhode Island General Laws, and regulations promulgated thereunder, which require that ten percent of the dollar value of work performed on the project be performed by minority business enterprises."~~

~~(ii) MBE Compliance Plan~~

~~A prospective prime contractor shall include in its bid on any construction project covered by these regulations, a simple statement acknowledging its obligation to meet the ten percent (10%) requirement under these regulations. After it has been identified as the apparent low bidder, the prime contractor shall, within ten (10) working days, prepare an MBE Compliance Plan and submit it to the Director or his designee for approval. The Plan shall identify by MBE name, subcontract dollar amount and type, each subcontract that the prime contractor projects will be awarded to MBEs over the period of the project.~~

~~(d) Approval or Disapproval of MBE Plan~~

~~(i) The Director or his designee will review and approve plans that reasonably ensure compliance with the ten percent (10%) requirement.~~

~~(ii) Where the prime contractor has proved that for reasons beyond the prime contractor's control, compliance with the ten percent (10%) requirement is impossible, the Director or his designee may approve a plan that ensures compliance with an MBE utilization rate of less than ten percent (10%). To prove impossibility of compliance, there shall be a hearing, which interested parties will be notified of and permitted to attend, during which the contractor shall demonstrate the following:~~

~~(1) The prime contractor is making all appropriate efforts, including those listed in paragraph 5(e) of these regulations, to increase MBE participation in its construction project to the ten percent (10%) level.~~

~~(2) Despite the prime contractor's efforts, the prime contractor's plan represents a reasonable expectation for the participation of MBEs in state contracts given the availability of MBEs to work on the contract.~~

~~(iii) If the Director or his designee does not approve the plan the prime contractor has submitted, the prime contractor, after consulting with the Director or his designee, shall present a revised plan.~~

~~(iv) The Director may condition the approval or establishment of any adjusted requirement on any reasonable future action by the prime contractor.~~

~~(v) Each prime contract covered under these regulations shall include the following: "The contractor agrees to ensure that minority business enterprises as defined in R.I. Gen. Laws Section 37-~~



~~14.1-3, shall have the maximum opportunity to participate in the performance of subcontracts performed under this agreement. The contractor will take all reasonable steps in accordance with regulations promulgated under Chapter 37-14.1 of the Rhode Island General Laws to ensure that minority business enterprises have the maximum opportunity to compete for and perform subcontracts under this agreement."~~

~~e. Compliance~~

~~(i) Each MBE coordinator will periodically conduct on-site inspections to determine compliance with the provisions of these regulations. The Division of Purchasing, the Director or the MBE Coordinator may require a prime contractor to furnish copies of purchase orders, subcontracts, cancelled checks, and other records that may indicate the number, names, dollar value of MBE subcontracts, dates, and schedule time for performance of work by an MBE subcontractor.~~

~~(ii) A prime contractor's failure to have an approved MBE Compliance Plan as required by these regulations constitutes non-compliance with these regulations.~~

~~(iii) If a prime contractor fails to meet the requirements outlined in its approved MBE Compliance Plan, it shall explain to the Director, in writing, why the requirements could not be met and why meeting the requirements was beyond the prime contractor's control.~~

~~(iv) To determine whether a prime contractor has a good faith reason for failing to meet its requirements, the Director may consider, among other factors:~~

~~(1) Whether the prime contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the state contracting authority to inform MBEs of contracting or subcontracting opportunities;~~

~~(2) Whether the prime contractor advertised in general circulation, trade association, and minority focus media concerning the subcontracting opportunities;~~

~~(3) Whether the prime contractor provided written notice to a reasonable number of specific MBEs that their interest in a contract was being solicited, in sufficient time to allow the MBEs to participate effectively;~~

~~(4) Whether the prime contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;~~

~~(5) Whether the prime contractor selected portions of work to be performed by MBEs in order to increase the likelihood of meeting MBE participation requirements (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);~~

~~(6) Whether the prime contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;~~

~~(7) Whether the prime contractor negotiated in good faith with interested MBEs;~~

~~(8) Whether the prime contractor made suggestions to interested MBEs to assist them in obtaining bonding, lines of credit, or insurance required by the prime contractor;~~

~~(9) — Whether the prime contractor effectively used the services of available minority community organizations, minority contractors' groups, local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.~~

~~—(v) If the prime contractor does not make such an explanation, or if the Director determines that the prime contractor's explanation does not justify its failure to meet the requirements in its approved MBE Plan, the Director may direct the prime contractor to take appropriate remedial action. Failure to take remedial action directed by the Director is noncompliance with these regulations.~~

~~—(vi) In the event of non-compliance with these regulations, the Director may take appropriate enforcement action. Such action may include suspension of payments, termination of the contract, recovery by the state of 10% of the contract price as liquidated damages and/or denial of the right to participate in future projects for up to three (3) years.~~

# ORR Regulatory Submission System

#394

<b>Review Stage</b>	PreliminaryDraft(topublishProposedRegulations)
<b>Regulatory Group</b>	GroupF
<b>Agency</b>	Administration
<b>A1: Regulation Title *</b>	REGULATIONS GOVERNING PARTICIPATION BY SMALL BUSINESS ENTERPRISES IN STATE PURCHASING OF GOODS AND SERVICES AND PUBLIC WORKS PROJECTS
<b>A2: Net Present Value (\$ or other measure)</b>	The net value of these Regulations is a reduction in discrimination against businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities
<b>A3: Agency Contact Person *</b>	Dorinda Keene
<b>A4: Contact Person Phone (+ extension) *</b>	(401) 574-8670
<b>A5: Contact Person Email *</b>	<a href="mailto:dorinda.keene@doa.ri.gov">dorinda.keene@doa.ri.gov</a>
<b>A6: Rulemaking Action *</b>	Amendment
<b>A7: Current ERLID (or "TBD") *</b>	TBD

**A8: Fiscal Impact to State or Municipalities ? \***

No

**A9: Regulation Reformatted? \***

Yes, this regulation has been reformatted for eventual inclusion in the Rhode Island Code of Regulations

**A10: Any Legal Deadline? \***

None

**A10a: Legal Deadline (if any) \***

**A11: Part of Consolidation ? \***

No

**A11a: Associated ERLIDS or Reg for Consolidation \***

**A12 (Emergency): Choose One \***

**A13 (Post-Comment):**

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**Any  
Comments  
Received? \***

**A14 (Post-  
Comment):  
Any Changes  
to Regulatory  
Language  
After Public  
Comment? \***

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**RECEIPT DATE** Tuesday, October 4, 2016

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**EOC  
CLEARANCE** Cleared by EOC

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**OVERALL  
REVIEW  
STATUS** Cleared

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**EOC  
CLEARANCE  
DATE** Monday, October 17, 2016

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**ORR  
CLEARANCE  
DATE** Wednesday, October 19, 2016

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**FINAL  
RESOLUTION  
DATE** Wednesday, October 19, 2016

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**DAYS IN  
REVIEW** 15

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**ANALYSIS  
CHANGED  
DURING  
REVIEW? (pre-  
or post-  
submission)**

NO

**REGULATION  
LANGUAGE  
CHANGED  
DURING  
REVIEW? (pre-  
or post-  
submission)**

YES

**FILED WITH  
SECRETARY  
OF STATE?**

NO – Not yet published/filed

**FINAL ERLID**

**B1: Reason for  
Regulatory  
Action/Change \***

The reason for this regulatory action is to adopt a criterion and formula to be used by State agencies when evaluating responses to Request for Proposals for State goods and services that will measure the utilization of businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities. In addition the regulatory action is being taken to update the rules regarding participation by businesses owned and controlled by individuals who are minorities and individuals who are women in State public works projects.

**B2: List of  
Changes to  
Regulatory  
Status Quo  
(only  
substantive**

Section 7.0 of the Regulations institutes a criterion for ISBE participation in the evaluation of Requests for Proposals (RFPs). Section 8.4.2 requires the submission of an MBE/WBE Compliance Plan within five business days of receipt of a tentative award letter for Request for Quotes (RFQs).

changes  
caused by  
amendments  
or repeals;  
cite by  
page/line  
number or  
section  
number) \*

**B3: Summary of Purpose of Entire Regulation \*** To support the fullest possible participation of businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities in State public works projects and in State purchases of goods and services.

**B4: Enabling RIGL State Statute \*** R.I. Gen. Laws §§ 37-14.1-6, 37-14.1-7, and 37-2.2-3.1

**B5: Describe/Cite any Federal Influence(s)** None

**C1: Any Overlap with Other Government Entities? \*** Yes

**C2: Overlapping Governmental Entities (if any) \*** Governor's Commission on Disabilities

**D1: Describe and Quantify Who Must Comply \*** All state departments, board, bureaus, agencies, and other public agencies that are required to adhere to the general principles, policies, and practices set forth in the State Purchasing Act, R.I. Gen. Laws § 37-2.1, et seq. except for the Department of Transportation which has received delegated authority to adopt its own regulations consistent with R.I. Gen. Laws Ch. 37-14.1.

**D2: Summary of Societal Benefits and Costs to Rhode Island \***

The societal benefits stemming from these Regulations is a reduction in discrimination against businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities. In the long term, the taxpayers of Rhode Island will receive a benefit as the cost to the State for purchasing goods and services will decrease. The reason being is that the subcontracting pool will increase as more opportunities are given to individuals who are minorities, individuals who are women, and individuals with disabilities. This will create more competition among subcontractors and as a result the State will receive greater value when purchasing goods and services. The societal costs are the administrative costs to State agencies and small businesses that choose to respond to Request for Proposals and Request for Quotes issued by the State.

**D3: Upload Full Benefit-Cost Analysis (PDF)**

**Final Benefit-Cost Analysis (PDF)**

**D4: Upload Fiscal Note (PDF) \***

**Review Stage** PreliminaryDraft(topublishProposedRegulations)  
**(SYSTEM – DO NOT TOUCH)**



**E1: Small Business Impact Determination (choose one) \*** YES, there is ADVERSE IMPACT on small business (continue on to complete the requirements of RIGL § 42-35.1-3 and 1-4).

**F1: Describe/Quantify Small Businesses That Must Comply \*** All small businesses that submit a proposal in response to a Request for Proposal or Request for Quote for goods and/or services issued by the State.

**F2: Describe/Quantify Any Projected Compliance Costs \***

The compliance costs for small businesses are undefined and are not mandatory. Small businesses will not be required to obtain any licenses or permits, nor will they be required to pay and fees or taxes. Alternatively, the costs will be minimal administrative costs that will only apply to small businesses that choose to respond to a State issued solicitation for goods and/or services. The administrative cost to the small businesses will be the cost of tracking its utilization of businesses owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities and the cost of submitting substantiating documentation to the State.

**F3: Describe Any Probable Regulatory Effects on Small Business \***

The probable regulatory effects on small businesses will be a net positive. Small businesses that are owned and controlled by individuals who are minorities, individuals who are women, and individuals with disabilities will have more opportunities to participate in the procurement of State goods and services. Through these opportunities, more small businesses will be able to gain experiences and enhance their resumes. Consequently, all small businesses that subcontract work out will be able to select from a larger and more skilled pool of subcontractors. This will offset the negative effects on small businesses which are the administrative costs associated with responding to a solicitation by the State for goods and/or services.

**Certify that the agency has fully considered the following.** \*

G1: YES, less stringent compliance or reporting requirements for small business were considered

G2: YES, less stringent small business schedules or deadlines for compliance or reporting requirements were considered

G3: YES, consolidation or simplification of compliance or reporting requirements for small business were considered

G4: YES, small business performance standards were considered instead of design/operational standards

G5: YES, small business exemptions for any requirements were considered

**G6:  
Explanation for Any Method Not Fully Considered**

**G7: Results of Alternative Methods Considered \***

There are no mandatory deadlines or reporting requirements because these Regulations only apply to small businesses that choose to respond to a Request for Proposal or Request for Quotes issued by the State. Once a small business opts to respond to a Request for Proposal or a Request for Quotes issued by the State, the business will be required to meet certain reporting requirements. All reporting requirements contained in the Regulations are necessary to track compliance and substantiate actual utilization rates. Removal of the reporting requirements will result in unsubstantiated data and may result in the reliance on inaccurate data. Relying on inaccurate utilization data may result in discrimination never being uncovered and could have significant legal consequences for the State.

**Regulatory Language Upload (PDF) \***  [regulations\\_governing\\_participation\\_by\\_small\\_business\\_enterprises\\_in\\_state\\_purchases\\_of\\_goods\\_and\\_services\\_and\\_public\\_works\\_projects1.pdf](#) 227.31 KB · PDF

**Post-Comment**

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**Only:  
Substantive  
Differences  
Between  
Proposed and  
Final  
Regulations  
(only  
substantive  
changes; cite  
by page/line  
number or  
section  
number) \***

**Post-  
Comment  
Upload 1:  
Final Reg  
Language,  
Clean (PDF) \***

**Post-  
Comment  
Upload 2: Reg  
Language,  
Changes Made  
Post-  
Comment  
Tracked (PDF)**

**Post-  
Comment  
Upload 3:  
Public**

**Comments**  
**(PDF)**

**Optional**  
**Upload: Any**  
**Additional**  
**Documents**

**REVIEWERS:**  
**Upload**  
**Additional/Re**  
**placement**  
**Document**

**REVIEWERS:**  
**Describe**  
**Additional/Re**  
**placement**  
**Document**

**Final Agency** Dorinda Keene  
**Certification**  
**of Accuracy \***

**Title \*** Assistant Administrator – MBE

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