

220-RICR-80-10-2

## **TITLE 220 – DEPARTMENT OF ADMINISTRATION**

### **CHAPTER 80 – DIVERSITY, EQUITY AND OPPORTUNITY**

#### **SUBCHAPTER 10 – MINORITY BUSINESS ENTERPRISE**

PART 2 – Regulations Governing Participation by Small Business Enterprises in State Purchase of Goods and Services and in Public Works Projects

#### **2.1 Authority**

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 Chapter 42-35.

#### **2.2 Purpose**

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.

#### **2.3 Scope**

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 Chapter 37-14.1 thereby exempting the Department of Transportation from the requirements of these Regulations.

#### **2.4 Waivers**

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.

## **2.5 Severability**

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.

## **2.6 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 Chapter 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.

## **2.7 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 § 2.11 of this Part.
- 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 § 2.9 of this Part 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

- a. 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 Chapters 37-14.1 and 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 Chapters 37-14.1 and 37-2.2 and shall be subject to the sanctions as prescribed in R.I. Gen. Laws § 37-14.1-8.

## **2.8 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 § 2.11 of this Part.
2. Agency Procedures. Each State Agency shall attempt to achieve the Aggregate Utilization Rate by applying one of the two methods as described in §§ 2.8(D)(3) and (4) of this Part.
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 § 2.8(D)(3) of this Part 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 Chapter 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 § 2.8(G)(4) of this Part 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, 3rd 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 Chapter 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 Chapter 37-14.1 and § 2.8 of this Part. 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 Chapter 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 § 2.8 of this Part can be satisfied concurrently with similar requirements mandated under federal law.
- I. Exceeding Lowest Bid by Five Percent. Nothing in § 2.8 of this Part 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 § 2.8 of this Part shall be construed to require the acceptance of non-conforming goods or services.

## **2.9 Standard Forms**

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.

## **2.10 RFP/RFQ Language**

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

## **2.11 Recordkeeping**

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 § 2.9 of this Part 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.

## **2.12 Amendments**

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 Chapter 42-35.

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