

NEW YORK CODES, RULES AND REGULATIONS
TITLE 5. DEPARTMENT OF ECONOMIC DEVELOPMENT
CHAPTER XIV. DIVISION OF MINORITY AND WOMEN'S BUSINESS DEVELOPMENT

PART 140. DEFINITIONS

Section 140.1. Definitions.

(a) Affirmative Action Program and Equal Employment Opportunity Program. A program involving the implementation of procedures and methods for the identification, recruitment and employment of minority group members and women. Such programs must include equal access to advancement and procedures for investigating claims of discrimination because of race, creed, color, national origin, sex, age, disability, [or] marital status and/or any other protected classes under applicable Federal, State, and local law. The overall result to be sought is to expand the employment opportunities of minority group members and women, also referred to as workforce diversity requirements.

(b) Applicant. A business enterprise which has applied for certification as a bona fide minority and/or woman-owned business enterprise.

(c) Articles of Procurement. Shall mean a commodity, service, technology, public work, construction, revenue contract, the purchase, sale, or lease of real property or an acquisition or granting of other interest in real property that is the subject of a governmental procurement, as defined in State Finance Law, section 139-j.

([c]d) Business enterprise. Any entity[, including a sole proprietorship, partnership, limited liability partnership, limited liability company or corporation, including not-for-profit corporations,] which is authorized to and engages in lawful business transactions in accordance with New York law.

(e) Broker. A business enterprise that fills orders for a client by ordering, purchasing, or receiving supplies from a third-party supplier rather than out of its own existing inventory and, in light of the standard industry practices, provides no substantial service other than acting as an intermediary between a supplier and a customer.

([d]f) Certified enterprise or certified business. A business enterprise which has been approved by the division of minority and/or woman-owned business enterprise status subsequent to verification that the business enterprise is owned, operated, and controlled by minority group members and/or women, and that also meets the financial requirements of subdivision (mm[ff]) of this section, and is a small business pursuant to subdivision (pp[hh]) of this section.

([e]g) Chief Diversity Officer. The Governor's principal advisor and representative regarding all matters related to State agency procurement policies concerning minority and/or women-owned business enterprises and State agency government workforce diversity.

([f]h) Commercially useful function. A minority or women-owned business enterprise performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and

supervising the work involved. To perform a commercially useful function, a minority or women-owned business enterprise must, where applicable and in accordance with any State agency specifications, also be responsible, with respect to materials and supplies used on the contract, for ordering and negotiating price, determining quality and quantity and installing. A minority or women-owned business enterprise does not perform a commercially useful function if its role adds no substantive value and is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation. Factors to be used in assessing whether a minority or women-owned business is performing a commercially useful function include:

- (1) the amount of work subcontracted;
- (2) industry practices;
- (3) whether the amount the minority or women-owned business enterprise is to be paid under the contract is commensurate with the work it is to perform;
- (4) the credit claimed towards minority or women-owned business enterprise utilization goals for the performance of the work by the minority or women-owned business enterprise; and
- (5) any other relevant factors.

(g) Contract scope of work. For purposes of this Subtitle, contract scope of work shall mean the scope of work set forth in the State contract including, but not limited to, services, products or other deliverables required by such contract and specific tasks required by such contract.

(h) Contracting agency. A party to a State contract, as defined in subdivision (ss) of this section, and in the case of contractual opportunities emanating from financing provided by the New York State Housing Finance Agency, Housing Trust Fund Corporation or Affordable Housing Corporation, as described in subdivision (rr) of this section.

(i) Contracting categories. Major procurement categories for which State agencies shall establish a master goal plan or, where applicable, an update to the master goal plan, as defined in subdivisions (ee) and (zz) of this section, respectively, and a four-year growth plan, as defined in subdivision (v) of this section, to promote the participation of certified minority and/or women-owned business enterprises.

(j) Contractor. An individual, a business enterprise, a not-for-profit corporation, or any other party to a State contract, or a bidder in conjunction with the award of a State contract or a proposed party to a State contract.

(k) Day or business day. A State business day unless otherwise specified.

(l) Director. The director of the New York State Department of Economic Development, Division of Minority and Women's Business Development, who may also be referred to as the executive director.

([m]o) Directory. The Directory of Certified Minority and Women-owned Business Enterprises, herein the Directory[The directory of certified enterprises], prepared by the director, for use by State agencies and contractors in complying with the provisions of article 15-A of the Executive Law.

([n]p) Disparity Study. The latest published study of New York State minority and/or women-owned business enterprise programs commissioned by the State pursuant to section 312-a of the Executive Law.

(q) Distributor. An enterprise that engages in the regular sale or lease of the items specified by the contract. A distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., a manufacturer's facility), making it liable for any loss or damage not covered by the carrier's insurance.

([o]r) Diversity practices. The contractor's past, present, and prospective practices and policies with respect to:

(1) utilizing certified minority and/or women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers; and

(2) entering into partnerships, joint ventures or other similar arrangements with certified minority and/or women-owned business enterprises as defined in this Part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority and/or women-owned business enterprises; and

(3) any other information requested by the State agency or activities, supported by affidavit, that demonstrate the contractor's commitment to a policy of diversity practices related to minority and/or women-owned business enterprises.

([p]s) Division. The office in charge of minority and women's business development in the department of economic development.

([q]t) Equal employment opportunities or EEO. A contractor and subcontractor's conscientious and active efforts to afford employment opportunities to minority group members and women without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

([r]u) Expenditure. Any payment by a State agency, including but not limited to payments made pursuant to a State contract, purchase order, invoice or non-personal services.

(v) Four-year growth plan. The plan which must be submitted by contracting agencies as part of its annual goal plan or as otherwise prescribed by the division, to determine a means of promoting and increasing participation by minority-owned and women-owned business enterprises with respect to State contracts and subcontracts.

(w) Fraudulent or misleading activity. An intentional misrepresentation related to a project or contract, or any statement submitted to a governmental entity with respect to a project or contract that the minority and/or women-owned business enterprise owner or contractor knew or should have known was untrue.

[(s) Articles of Procurement. Shall mean a commodity, service, technology, public work, construction, revenue contract, the purchase, sale, or lease of real property or an acquisition or granting of other interest in real property that is the subject of a governmental procurement, as defined in State Finance Law section 139-j.]

[[t]x] Goals. The term referring to the percentage of aggregate agency expenditures targeted for the participation of certified minority and[/or] women-owned business enterprises sought to be included in State procurement opportunities as prime contractors, subcontractors, suppliers, consultants, joint ventures, teaming agreements, or other similar arrangements. Goals may be expressed as agency-specific or contract goals.

[(u)y] Hearing officer. An individual who has been appointed by the director to hear:

- (1) appeals of decisions denying or revoking certification; and
- (2) complaints regarding:
 - (i) a State agency's denial of a waiver;
 - (ii) a State agency's disqualification of a contractor before an award is made;
 - (iii) a contractor's failure or refusal to abide by a utilization plan after an award is made; or
 - (iv) a contractor's noncompliance with Equal Employment Opportunity

(z) Industry Specific Competency: Possession of the specialized expertise and qualifications required to execute and technically assess industry-critical functions. It demonstrates the ability to judge work quality against current regulatory standards and best practices.

[(v)aa] Joint venture. A contractual agreement joining together two or more business enterprises, one of which is a certified minority and/or woman-owned business enterprise, for the purpose of performing on a State contract. The certified minority and/or woman-owned business enterprise must provide a percentage of value added services representing an equitable interest in the joint venture. All parties agree to share in the profits and losses of the business endeavor according to their percentage of equitable interest.

[(w)bb] Labor force availability data. Data pertaining to the relevant availability and expected levels of participation of minority group members and women on State contracts. The data is developed by the New York State Department of Economic Development, Division of Minority and Women's Business Development, in cooperation with and including but not limited to, the Department of Labor and any other New York State or federal governmental data collecting agency that collects such data, and is based upon the most recent census data provided by the

New York State Department of Labor, Bureau of Labor Market Information, aggregated by the Division of Minority and Women's Business Development into federal occupational categories.

([x]cc) Lessee. An individual or a business enterprise, including concession vendors, or any other party to a lease in which the lessor is a State agency as defined in subdivision (qq[ii]) of this section.

(dd) Manufacturer. A business that owns (or leases) and operates independently a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. Manufacturing includes blending or modifying raw materials or assembling components to create the product to meet contract specifications. When a business makes minor modifications to the materials, supplies, articles, or equipment, the business is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

([y]ee) Master goal plan. An agency-specific annual goal plan, which establishes agency goals and identifies expenditures, strategies, personnel, processes and procedures intended to increase the participation of certified minority and/or women-owned business enterprises in the subject State agency's procurement.

([z]ff) Mentor-Protégé agreement. A contract between a prime contractor, the "Mentor," and a minority and/or women-owned business enterprise, the "Protégé," in which there is a transfer of knowledge, technology, or other resources, which promotes the economic growth of the minority and/or women-owned business enterprise or fosters the establishment of a long term business relationship between the parties.

([aa]gg) Minority group member. [A] United States citizen or permanent resident noncitizen[alien] who is and can demonstrate membership in one of the following groups:

- (1) Black persons having origins in any of the Black African racial groups;
- (2) Hispanic or [/]Latino/a/x/e persons, defined as individuals of Mexican, Puerto Rican, Dominican, Cuban, Central American or South American descent, of either Native American or Latin American origin, regardless of race;
- (3) Native American or Alaskan native persons having origins in any of the original peoples of North America; or
- (4) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent[Subcontinent] or the Pacific Islands.

([bb]hh) Minority-owned business enterprise. A business enterprise that is:

- (1) at least 51 percent owned by one or more United States citizens or permanent resident noncitizens[aliens] who are minority group members;
- (2) an enterprise in which such minority ownership is real, substantial and continuing;

(3) an enterprise in which such minority ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the business enterprise;

(4) an enterprise authorized to do business in this State and is independently owned and operated;

(5) an enterprise owned, either directly or through a holding company[established for the exclusive and sole purpose of leasing machinery, equipment, or vehicles exclusively to the certified minority or women-owned business enterprise], by an individual or individuals, whose ownership, control and operation are relied upon for certification, with an individual personal net worth at the time of application that does not exceed fifteen million dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year starting in 2020; or such other amount that the director shall determine on an industry-by-industry basis; [and]

(6) an enterprise that is a small business pursuant to subdivision (pp[hh]) of this section[.]; and

(7) an enterprise owned by a woman who is also a minority group member may be certified as a women-owned business enterprise, a minority-owned business enterprise, or both, and may be counted towards either a women-owned business enterprise goal or a minority-owned business enterprise goal, in regard to any contract or any goal, set by a State agency, but such participation may not be counted towards both such goals and may not be divided between the minority-owned business enterprise goal and the women-owned business enterprise goal by a State agency.

([cc]ii) New York State Department of Economic Development, Division of Minority and Women's Business Development [or] [" (the "division"). The office responsible for implementing the requirements of article 15-A of the Executive Law.

([dd]jj) New York State minority and [women]woman-owned business enterprise certification application. The form that the division requires an applicant to submit for purposes of applying for minority and/or woman-owned business enterprise status.

([ee]kk) Not dominant in its field. A business enterprise which does not exercise a controlling influence on an industry in its field of operation.

(ll) Passive Investment. An investment into the applicant business made by an individual other than the owner relied upon for certification, herein the "investor," which disproportionately exceeds the investor's equity interest, but meets all of the following conditions:

(1) Demonstrably Passive Role: The investor's role is strictly financial. The investor does not participate in the day-to-day or strategic management of the business, thereby ensuring minority and/or women owners retain the authority to operate and control the enterprise independently.

(2) Commercially Reasonable Terms: The terms of the investment are documented in a formal, written agreement. The terms must be commercially reasonable.

(3) Nature of Investment: The nature and terms of an investment do not functionally contradict the applicant's ability to satisfy all certification criteria.

(i) The applicant must fully disclose the nature and terms of the passive investment. The division reserves the right to determine that the nature and terms of an investment functionally contradict the applicant's ability to satisfy all certification criteria in section 144.2 of this Title.

(ff)mm Personal net worth. The aggregate adjusted net value of the assets of an individual remaining after total liabilities are deducted. Personal net worth includes the individual's share of assets held jointly with said individual's spouse and does not include the individual's ownership interest in the certified minority and/or women-owned business enterprise, the individual's equity in his or her primary residence, ownership interest in a holding company [established for the exclusive and sole purpose of leasing machinery, equipment, or vehicles exclusively to the certified minority or women-owned business enterprise,]that is majority owned by [the] minority group members and/or women[woman] relied upon for certification, and the holding company does not own any other assets of any kind; or up to seven hundred and fifty thousand dollars of the present cash value of any qualified retirement savings plan or individual retirement account held by the individual less any penalties for early withdrawal. Personal net worth shall be calculated on an individual basis and shall not be aggregated in instances where there are multiple individuals relied upon for certification.

(nn) Service provider. An entity who self-performs a service identified in the utilization plan.

(gg)oo Significant business presence. A business authorized to do business in New York State with the New York State Department of State, Division of Corporations at time of application, and that makes a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or that has any payroll in New York State. Businesses that cannot show that they meet this requirement at time of application, the division may, at its discretion, reject such application.

(hh)pp Small business. A business which has a significant business presence in the State, is independently owned and operated, and is not dominant in its field, but in no event employs more than three hundred people. In determining whether the enterprise meets the definition of a small business as herein provided, consideration shall be given to federal small business administration standards prescribed in 13 CFR Section 121.201, effective as of August 22, 2008. A copy of 13 CFR Section 121.201 can be accessed at the Office of Size Standards, Small Business Administration, 409 3rd Street, SW Washington, DC 20416.

(ii)qq State agency[.]:

- (1) any State department;
- (2) any division, board, commission or bureau of any State department;

(3) the State University of New York and the City University of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the State;

(4) a board, a majority of whose members are appointed by the Governor or who serve by virtue of being State officers or employees as defined in subparagraph (i), (ii) or (iii) of section 73(1)(i) of the Public Officers Law;

(5) [A]a “State authority,” as defined in subdivision one of section two of the [public authorities law] Public Authorities Law, and the following: Albany County Airport Authority; Albany Port District Commission; Alfred, Almond, Hornellsville Sewer Authority; Battery Park City Authority; Cayuga County Water and Sewer Authority; (Nelson A. Rockefeller) Empire State Plaza Performing Arts Center Corporation; Industrial Exhibit Authority; Livingston County Water and Sewer Authority; Long Island Power Authority; Long Island Rail Road; Long Island Market Authority; Manhattan and Bronx Surface Transit Operating Authority; Metro-North Commuter Railroad; Metropolitan Suburban Bus Authority; Metropolitan Transportation Authority; Natural Heritage Trust; New York City Transit Authority; New York Convention Center Operating Corporation; New York State Bridge Authority; New York State Olympic Regional Development Authority; New York State Thruway Authority; Niagara Falls Public Water Authority; Niagara Falls Water Board; Port of Oswego Authority; Power Authority of the State of New York; Roosevelt Island Operating Corporation; Schenectady Metroplex Development Authority; State Insurance Fund; Staten Island Rapid Transit Operating Authority; State University Construction Fund; Syracuse Regional Airport Authority; Triborough Bridge and Tunnel Authority; Upper Mohawk Valley Regional Water Board; Upper Mohawk Valley Regional Water Finance Authority; Upper Mohawk Valley Memorial Auditorium Authority; and Urban Development Corporation and its subsidiary corporations; and

(6) [T]the following only to the extent of State contracts entered into for its own account or for the benefit of a State agency as defined in paragraphs (1) through (5) of this subdivision:

Dormitory Authority of the State of New York;
Facilities Development Corporation;
New York State Energy Research and Development Authority.

([jj]rr) State-assisted housing project. A project which receives a grant or loan for all or part of the total project cost from the New York State Housing Finance Agency, the Affordable Housing Corporation, Housing Trust Fund Corporation or the Division of Housing and Community Renewal;

(1) a permanent housing project for homeless families or project as defined in section 64(5) of the Private Housing Finance Law;

(2) a project as defined in section 1101(12) of the Private Housing Finance Law provided said project is located in a large county and consists of more than 12 residential

units at a single site. For purposes of this paragraph, large county shall have the same meaning as set forth in section 310(5) of article 15-A of the Executive Law;

(3) affordable home ownership development programs or project as defined in section 1111(8) of the Private Housing Finance Law provided said project is located in a metropolitan area as herein defined and consists of more than 12 residential units at a single site. For purposes of this paragraph metropolitan area shall have the same meaning as set forth in section 310(6) of article 15-A of the Executive Law;

(4) a turnkey/enhanced rental project or project as defined in section 1106-a(2) of the Private Housing Finance Law;

(5) infrastructure improvements as defined in section 1131(2) of the Private Housing Finance Law, to the extent that such infrastructure improvements are applied for in connection with a State-assisted housing project as defined in paragraphs (1) through (4) of this subdivision and provided further that the applicant for such infrastructure improvements and for such State-assisted housing project is identical.

([kk]ss) State contract. For purposes of this Subtitle, State contract shall mean:

(1) [A]any written agreement, and amendment(s) thereto, providing for a total expenditure in excess of twenty-five thousand dollars (\$25,000), whereby a State agency is committed to expend or does expend funds in return for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;

(2) a written agreement in excess of one hundred thousand dollars (\$100,000) whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon;

(3) a written agreement in excess of one hundred thousand dollars (\$100,000) whereby the owner of a State-assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project;

(4) leases of real property by a State agency to a lessee where the terms of such leases provide for the State agency to be engaged in construction, demolition, replacement, major repair or renovation of real property and improvements thereon, and the cost of such construction, demolition, replacement, major repair or renovation of real property and improvements thereon is in excess of one hundred thousand dollars (\$100,000);

(5) a written agreement whereby a State agency purchases, sells, leases, acquires or grants an interest in real property and where the terms of such agreement provide for a party to such agreement to:

(i) perform construction, construction-related services, or services necessary to complete the transfer of interest in real property, or

(ii) purchase a commodity related to the activities set forth in [subsection]subparagraph (5)(i);

(6) all revenue contracts and articles of procurement as defined in State Finance Law Section 139-j, provided that any such agreement for the purchase, sale or lease of real property or an acquisition or granting of other interest in real property must satisfy the requirements set forth in [section] subparagraph (ss[kk])(5)(i)-(ii).

(tt) Statewide Advocate. The Statewide Advocate shall mean the person appointed by the commissioner to serve in the capacity of the minority and women-owned business enterprise Statewide Advocate. The Statewide Advocate shall have all the powers and duties prescribed under article 15-A of the Executive Law.

([ll]uu) Subcontract. Any agreement for a total expenditure in excess of twenty-five thousand dollars (\$25,000) resulting from a State contract providing for services, including non-staffing expenditures, supplies or materials of any kind between a business enterprise and a prime contractor, in which a portion of the prime contractor's obligation under the State contract is undertaken or assumed by a business enterprise not owned or controlled by the prime contractor.

([mm]vv) Substantially fails. A contracting agency that has failed to make a good faith effort as determined by the division to meet sixty (60) percent of its annual agency-specific goals.

([nn]ww) Supplemental Application. The form that the division requires an applicant to submit for purposes of applying for expeditious certification based on certification as a minority and/or women-owned business enterprise by entities referenced in sections 144.[5]6 and 144.[6]7 of this Title.

(xx) Supplier. A business enterprise that operates a store, warehouse, or other establishment where materials, supplies or equipment required under a contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A supplier must purchase and keep materials in stock, and have a method to sell those materials to the public, through a storefront or website, and cannot supply materials specifically for a single contract.

([oo]yy) Teaming Agreement. A utilization plan arrangement between two or more parties, one of which is a certified minority and/or women-owned business enterprise, to perform on a specific State contract if awarded to the team. The team itself may be a joint venture, or one of the team members may be designated to act as the prime contractor, and the other member(s) designated to act as subcontractors.

([pp]zz) Update to the master goal plan. An annual update to an existing master goal plan that is submitted by an agency to the division in lieu of a full master goal plan as defined in subdivision (ee[y]) of this section.

([qq]aaa) Utilization plan. The plan which must be submitted by a contractor to a State agency listing certified minority and/or women-owned business enterprises that the contractor intends to

use in the performance of a proposed State contract, or any components of the contract scope of work which the contractor intends certified minority and/or women-owned business enterprises to perform. The plan shall specifically contain a list, including the name, address and telephone number of each certified enterprise with which the contractor intends to subcontract, or otherwise submit in connection with satisfaction of the contract goals.

([rr]bbb) Value added. A substantive increase to the performance of a State contract by a certified minority and/or women-owned business enterprise as a joint venture partner, subcontractor, consultant, or supplier, where such a certified minority and/or women-owned business enterprise performs a commercially useful function pursuant to subdivision (h[f]) of this [Section]section.

([ss]ccc) Verification. Any act necessary to determine whether a business enterprise seeking to be certified by the division is owned, controlled and operated by principals who are members of a minority group, as defined in subdivision (gg[aa]) of this section, or women; and that those principals' personal net worth does not exceed the limitations listed in subdivision (mm[ff]) of this section. Such acts may include, but are not limited to, request(s) for documents in addition to the initial application and inspection of the place of business.

([tt]ddd) Waiver form. The form provided by a State agency to a contractor as part of a solicitation, relative to a request by the contractor to set aside or modify the participation of certified minority and/or women-owned business enterprises in the performance of State contracts.

([uu]eee) Women-owned business enterprise.

(1) A business enterprise that is:

- (i) at least 51 percent owned by one or more United States citizens or permanent resident noncitizens[aliens] who are women;
- (ii) an enterprise in which the ownership interest of such women is real, substantial and continuing;
- (iii) an enterprise in which such women ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the enterprise;
- (iv) an enterprise authorized to do business in this State and which is independently owned and operated;
- (v) an enterprise owned, either directly or through a holding company [established for the exclusive and sole purpose of leasing machinery, equipment, or vehicles exclusively to the certified minority or women-owned business enterprise], by an individual or individuals, whose ownership, control and operation are relied upon for certification, with an individual personal net worth at the time of application that does not exceed fifteen million dollars, as adjusted

annually on the first of January for inflation according to the consumer price index of the previous year starting in 2020; or such other amount that the director shall determine on an industry-by-industry basis; and

(vi) an enterprise that is a small business pursuant to subdivision (pp[hh]) of this section.

(2) An enterprise owned by a minority group member who is also a woman may be certified as a minority-owned business enterprise, a women-owned business enterprise, or both, and may be counted towards either a minority-owned business enterprise goal or a women-owned business enterprise goal, in regard to any contract or any goal, set by a State agency, but such participation may not be counted towards both such goals and may not be divided between the minority-owned business enterprise goal and the women-owned business enterprise goal by a State agency.

[(vv) Four-year growth plan. The plan which must be submitted by contracting agencies as part of its annual goal plan or as otherwise prescribed by the division, to determine a means of promoting and increasing participation by minority-owned and women-owned business enterprises with respect to State contracts and subcontracts.]

[(ww) Statewide Advocate. The Statewide Advocate shall mean the person appointed by the commissioner to serve in the capacity of the minority-and women-owned business enterprise Statewide Advocate. The Statewide Advocate shall have all the powers and duties prescribed under Article 15-A.]

(fff) Working knowledge and ability: The qualifying owners of an applicant business must have a sufficient understanding of a subject or skill to be able to use it effectively in a practical context and the ability to perform the industry specific critical functions of the business.

PART 141. STATE AGENCY RESPONSIBILITIES

Section 141.1. Purpose, scope and applicability.

(a) The purpose of this Part is to establish standards, criteria, and procedures by which State agencies set annual goals for direct and indirect contracting opportunities with certified minority[-]and women-owned business enterprises, and the processes by which these master goal plans are submitted, including what information needs to be reported, and procedures and consequences for State agencies that fail to achieve their goals without a good faith effort to maximize contractual opportunities for certified enterprises.

Section 141.2. Annual State agency-specific goals.

(a) Each State agency shall develop and adopt agency-specific goals in accordance with [Section]section 313(1-b) and [Section]section 313 (1-c) of the Executive Law, and which are consistent with the finding of the disparity study.

(b) Agency-specific goals shall be reflected in the State agency's master goal plan and any subsequent updates to the master goal plan, as well as for any four-year growth plan, for the inclusion of certified:

- (1) minority-owned business enterprises;
- (2) women-owned business enterprises; and
- (3) minority and women-owned business enterprises with justifications for such goals.

(c) Agency-specific goals shall be set upon a review of the scope, character and relevant expenditures associated with the State contracts that are expected to be let or performed during the relevant fiscal year and shall be based on specific factors concerning said State contracts, which shall include, where applicable, the following:

- (1) Statewide availability of minority[-]and women-owned business enterprises for construction, construction related services, non-construction related services and commodities contained within the Disparity Study and section 313(1) of article 15-A of the Executive Law;
- (2) Statewide disparities of minority and [or] women-owned business participation in State contracting for construction, construction related services, non-construction related services or commodities that the agency expects to contract for, as reflected in the Disparity Study;
- (3) The availability of certified minority[-]and women-owned business enterprises for the State agency's State contracts found in the Directory [of Certified Minority and Women-Owned Businesses](<https://ny.newnycontracts.com>);
- (4) The geographic location(s) of the performance of the State agency's contracts;
- (5) The extent to which geography is material to the performance of the State contract and the ability of certified minority and women-owned business enterprises that are located outside of the geographic location(s) to perform on State contracts notwithstanding their location; and
- (6) Such other factors as the State agency can specifically delineate and justify with supporting facts and documentation.

(d) Agency-specific goals shall be established on a State fiscal year basis or, where the State agency operates on a different fiscal year and upon the approval of the director, the State agency's fiscal year.

Section 141.3. Master goal plan.

(a) Each State agency is responsible for and required to have an active master goal plan, or an update to the master goal plan as prescribed by the director, and a four-year growth plan, as described in section 141.3(e) of this Title, on file with the division.

(b) In the event a State agency is deficient with regard to the requirement set forth in subdivision (a) of this section, the subject State agency shall take affirmative measures to submit a master goal plan to the division within thirty (30) days of receipt of a written notice of such a deficiency.

(c) Such master goal plan shall include the following:

(1) Agency-specific goals set pursuant to section 141.2 of this Part for minority-owned business enterprises; women-owned business enterprises; and minority[-]and women-owned business enterprises;

(2) Agency-specific goals expressed as a percentage of aggregate agency expenditures, specifically including each of the following contracting categories, or in limited circumstances due to administrative necessity, other such categories established by the director, referenced in or pursuant to the Disparity Study:

(i) construction;

(ii) construction related services;

(iii) non-construction related services; and

(iv) commodities;

(3) A description of any practices, procedures, strategies or actions, in addition to those referenced in these regulations, that may be implemented by the agency to ensure maximum feasible participation by certified minority and/or women-owned business enterprises in State contracts;

(4) A list of personnel responsible for the implementation of article 15-A of the Executive Law, which shall include their title, a description of their responsibilities, the percentage of their time allocated to implementation of article 15-A of the Executive Law and the State agency organization chart showing lines of authority and reporting between listed personnel and senior executive staff;

(5) Any other applicable appropriation and expenditure which may not be subject to goals, but that the State agency deems relevant or necessary to the promotion and participation of minority[-]and women-owned business enterprises in State procurement; and

(6) Such other information that a State agency deems relevant or necessary to its master goal plan.

(d) The master goal plan shall be the basis for each State agency's prospective efforts, practices and procedures to reasonably achieve the maximum feasible participation of minority[-]and women-owned business enterprises in the State agency's procurement.

(e) Four-Year Growth Plan. Every four years, beginning September fifteenth, two thousand and twenty, each agency shall include in such annual report its four-year growth plan pursuant to section three hundred eleven of the executive law, to determine a means of promoting and increasing participation by minority-owned and women-owned business enterprises with respect to State contracts and subcontracts; and such reports shall be due in a form and manner as described by the director by no later than January 15th, beginning in 2021.

(f) Annual Growth Plan. Each State agency shall, in their master goal plan or master goal plan update, report to the director, all activities taken to promote minority group members and women, as well as the increased participation by certified minority and/or women-owned business enterprises on State contracts and subcontracts. Such submission as it pertains to this section shall be submitted to the division by no later than May 15 of each reporting year, or at such time as determined by the director.

Section 141.4. State agency master goal plan submission procedure.

(a) All State agencies subject to article 15-A of the Executive Law shall submit and/or have an active Master Goal Plan in force and on file with the division.

(b) The director shall make a copy of the Disparity Study available on the division's website.

(c) Each State agency shall submit a master goal plan or an update to the master goal plan, pursuant to subdivision (e) of this section, to the director on or before January 15 of each year, or at such time determined by the director pursuant to section 141.5(c) of this Part, in such form as may be required by the director.

(d) The director may, in limited instances where exigent circumstances warrant such a measure and upon the approval of the chief diversity officer, require a State agency to submit an interim master goal plan or an interim update to the master goal plan on a date certain and such plan shall be in effect until such time as the director has received and approved a master goal plan pursuant to subdivision (c) of this section and section 141.5(b) of this Part, respectively.

(e) In instances where a State agency has an accepted master goal plan on file with the division and such State agency is in good standing with the division regarding its good faith efforts to achieve the maximum feasible portion of its agency-specific goals as outlined therein, the director may, at his or her discretion, permit a State agency to submit an update to the master goal plan in lieu of a submission of a new master goal plan. Notwithstanding the foregoing, a new master goal plan must be submitted to the division by each State agency a minimum of once every four (4) years.

(f) Any agency that refuses or fails to submit a master goal plan pursuant to this section shall be deemed to have failed to achieve its good faith standard pursuant to section 313 of the Executive Law and shall be referred to the chief diversity officer for appropriate action.

Section 141.5. State agency master goal plan review.

(a) The director shall review the agency master goal plan to determine:

- (1) whether the goals within the plan are reasonable and reflective of a process that has employed a rigorous assessment of the agency's total procurement portfolio as it relates to the participation of minority[-] and women-owned business enterprises in agency contracts;
 - (2) whether the factual basis and supporting documentation for such goals comport with the requirements set forth in section 141.2 of this Part;
 - (3) whether the goals set by the State agency adequately reflect the availability of certified minority and women-owned business enterprises for the agency's contracts; and
 - (4) whether other factors raised in the master goal plan have a legitimate substantive impact on the goals set by the State agency.
- (b) Following the submission of a master goal plan by a State agency and review of such a master goal plan by the director, the director shall:
- (1) provide written notice of the acceptance of the master goal plan;
 - (2) provide written notice of and reasoning for the rejection of the master goal plan and direct the agency to submit new goals in accordance with this Part and instruction by the director;
 - (3) provide written notice of the necessity for an extension of the time period during which the master goal plan will be reviewed; or
 - (4) provide written notice of the need for additional documentation or explanation, which shall be provided by the agency within a time frame as set forth by the director.
- (c) Where subsequent to a State agency's submission of a master goal plan the director determines that a State agency has failed to achieve its good faith standard, as defined in section 141.7 of this Part, the director shall, notwithstanding subdivision (b) of this section, direct in writing that the annual agency-specific goals, as required by 141.2 of this Part, be adjusted as set forth by the director and adopted by the subject State agency.
- (d) A State agency shall resubmit its master goal plan within thirty (30) days of receipt of a notice of rejection incorporating recommended modifications or stating any reasons why modifications recommended by the director cannot be incorporated in the State agency's master goal plan.
- (e) Updates to the master goal plan submitted by a State agency shall be subject to the same provisions, contained within this section, that govern the review of master goal plans.

Section 141.6. State agency compliance reporting.

- (a) Each State agency shall submit a quarterly compliance report in a form and manner required by the director. The report is submitted quarterly over the fiscal year. The four reporting quarters are April 1 - June 30 (1st quarter due July 15); July 1 - September 30[1] (2nd

quarter due October 15); October 1 - December 31 (3rd quarter due January 15); and January 1 - March 31 (4th quarter due April 15). The compliance report shall include the following information regarding State contracts and subcontracts awarded in the interval since the last compliance report:

- (1) the number of State contracts awarded, the maximum dollar amount obligated pursuant to those contracts, and total expenditures pursuant to all such contracts;
- (2) the number of State contracts awarded to certified minority and/or women-owned business enterprises, the maximum dollar amount obligated pursuant to all those contracts, and the total expenditures made pursuant to all such contracts;
- (3) the number of State contracts awarded which include a utilization plan for business participation by certified minority and/or women-owned business enterprises as subcontractors, the maximum amount obligated pursuant to those contracts, and the total expenditures made pursuant to all such contracts, and the percentage of those expenditures awarded pursuant to certified minority and/or women-owned business enterprises;
- (4) the number of State contracts awarded upon which a waiver was granted from goals required by the contracts for business participation by certified minority and/or women-owned business enterprises, and the maximum amount obligated pursuant to those contracts as well as a summary of the waivers;
- (5) the number of State contracts awarded which required goals for employment of minority group members and women;
- (6) the number of State contracts awarded for which waivers of employment goals required by the contracts have been granted;
- (7) a justification of any waivers granted pursuant to paragraphs (4) and (6) of this section;
- (8) a statement of whether it is in compliance with its agency goal plan based on information provided in the compliance report, and if it is not in compliance with its agency goal plan, a description of the actions which will be taken to comply with the State agency goal plan;
- (9) whether the State agency has been required to prepare a remedial plan and, if so, the plan (attached as an exhibit) and the extent to which the agency has complied with each element of the plan; [and]
- (10) any additional information relevant or necessary to demonstrate the State agency's compliance for utilization of certified minority and women-owned business enterprises in its contracts or procurement practices[.]; and

(11) the value of the commodities or services provided by the certified minority and/or women-owned business enterprise under the State agency's discretionary purchasing authority pursuant to New York State Finance Law shall be reported as follows:

(i) if the certified business enterprise performed all of the work in the contract, the total contract value shall be reported in the quarterly compliance report in the format deemed appropriate by the director;

(ii) if the certified business enterprise performed only a portion of the work in the contract, the actual amount of work performed by the certified business enterprise shall be reported in the quarterly compliance report in the format deemed appropriate by the director.

(iii) if an agency makes a purchase in the amount of \$25,000 or below and does not exercise the discretionary purchasing authority, then this amount shall not be reported as a discretionary purchase in the quarterly compliance report.

(b) Each State agency required to submit an annual report to the governor and legislature pursuant to section one hundred sixty-four of the executive law shall include its annual goals for contracts with certified minority and women-owned business enterprises; the number and dollar amount of actual contracts and subcontracts issued to certified minority and women-owned business enterprises; and, a summary of all waivers of the requirements of subdivisions six and seven of section three hundred thirteen of the Executive Law allowed by the reporting agency during the preceding year, including a description of the basis of the waiver request and the rationale for granting such waiver. Each State agency shall also include in such annual report whether or not it has been required to prepare a remedial plan (attached as an exhibit), and, if so, the plan and the extent to which the State agency has complied with each element of the plan.

Section 141.7. State agencies' good faith efforts.

(a) State agencies shall make a good faith effort to achieve the maximum feasible portion of the State agency's goals adopted pursuant to this [title]Title.

(b) Each State agency's designated minority and woman-owned business enterprise liaison and/or procurement officer, or reasonable substitute, shall attend at least two trainings organized by the division, on or before the end of each fiscal year, to assist such liaisons and/or officers with pursuing the objectives of this section.

([b]c) To determine whether the State agency has exercised good faith, the director must consider the following:

(1) whether there are certified minority and[/or] women-owned business enterprises that could participate in the type of procurement opportunities that the agency has to offer as prime contractors or subcontractors;

(2) whether the State agency has attempted to unbundle State contracts and solicit bids from the certified minority and women-owned businesses;

- (3) whether there are certified minority and[/or] women owned business enterprises, located outside of the regions in which State contracts are to be performed, that could participate in procurement opportunities;
- (4) whether the State agency has considered encouraging joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and certified minority[-]and women-owned business enterprises to participate in the State agency's procurement opportunities;
- (5) the number of opportunities that the State agency had to make discretionary purchases from certified minority and/or women-owned business enterprises versus the number of times the State agency actually made discretionary purchases from certified minority and/or women-owned business enterprises;
- (6) the amounts paid to certified minority and/or women-owned business enterprises as a result of the State agency's discretionary purchasing as set forth in State Finance Law or other applicable law;
- (7) whether the State agency developed selective bidder lists that included certified minority and[/or] women-owned business enterprises;
- (8) the number of times that the State agency negotiated with certified minority and women-owned businesses directly;
- (9) whether the State agency has processes and procedures in place to ensure that it has assessed each State contract for certified minority and women-owned business enterprise contract goals as required by section 142.2 of these regulations;
- (10) whether the State agency's designated minority and woman-owned business enterprise liaison and/or procurement officer, or reasonable substitute, attended at least two trainings organized by the division, on or before the end of each fiscal year, as required by subdivision (b) of this section;
- ([10]11) whether the State agency's practices and procedures comport with article 15-A of the Executive Law and Part 142 of these regulations with respect to utilization plans, utilization reports and waivers[.];
- ([11]12) whether the State agency has submitted compliance reports pursuant to section 141.6 of this Part; and
- ([12]13) any other information submitted by the State agency or other criteria that the director deems relevant to determining whether the State agency exercised good faith, including but not limited to, the agency's compliance with the provisions of article 15-A of the Executive Law and these regulations.

Section 141.8. State agency remediation.

- (a) Each State agency that substantially fails to make a good faith effort as defined by the director to achieve the maximum, feasible participation of minority and women-owned business enterprises in such agency's contracting shall be required to submit to the director a remedial action plan to remedy such failure.
- (b) Such remedial action plan shall, at a minimum, identify the factors that contributed to the State agency's substantial failure to meet its agency-specific goals and outline strategies, practices, procedures and measures that the State agency will employ to reasonably meet the maximum feasible portion of the agency-specific goals.
- (c) If it is determined by the director that any State agency has failed to act in good faith to implement the remedial action plan, within one year, the director shall provide written notice of such a finding, which shall be publicly available, and direct implementation of the following affirmative measures, as appropriate:
 - (1) expansion of sufficient and effective solicitation efforts to certified minority and women-owned business enterprises;
 - (2) review of all procurement opportunities to determine whether procurements can be unbundled into smaller quantities that may expand the participation of certified minority and women-owned business enterprises;
 - (3) elimination of extended experience, capitalization requirements, or bonding requirements, where feasible, as a means to expand participation by certified minority and women-owned business enterprises;
 - (4) identification of specific expenditures as particularly attractive or appropriate for participation by certified minority and women-owned business enterprises; and
 - (5) maximization of the number of awards made to certified minority and women-owned business enterprises pursuant to section 163(6) of the State Finance Law.
- (d) Upon a finding by the director that a State agency has failed to take affirmative measures to implement the remedial action plan and to follow any of the remedial actions set forth by the director, and in the absence of any objective progress towards the State agency's goals, the director may require that some or all of the State agency's procurements, for a specified period of time, be placed under the direction and control of another State agency or agencies.

PART 142. REQUIREMENTS AND PROCEDURES
REGARDING PARTICIPATION BY CERTIFIED MINORITY
AND WOMEN-OWNED BUSINESS ENTERPRISES ON
STATE CONTRACTS

Section 142.1. Purpose, scope and applicability.

- (a) The purpose of this Part is to provide standards, criteria and procedures for establishing contract goals; to regulate, prepare, submit, and review utilization plans, to prescribe the

elements of a contractor's good faith efforts to be reviewed when a waiver of goals is requested, and to provide procedures for evaluating compliance and resolving disputes related to participation by certified minority and women-owned business enterprises on State contracts.

(b) This Part shall also provide standards, criteria and procedures relating to the awarding of State contracts. Such standards, criteria and procedures shall relate to the past, present and prospective use of certified minority and women-owned business enterprises as a subcontractor, joint ventures or partners and the establishment of quantitative factors for certified minority and/or women-owned business enterprise status.

Section 142.2. Establishing contract goals and identifying subcontract opportunities for certified businesses.

(a) Where practical, feasible and appropriate, and in a manner consistent with the findings of the disparity study, State agencies shall establish the following goals on all State contracts:

- (1) overall minority and women-owned business enterprises;
- (2) minority-owned business enterprises; and
- (3) women-owned business enterprises.

(b) State agencies shall notify contractors in bid documents, requests for proposals, contract announcements advertisements or otherwise in writing of the goals established on State contracts.

(c) State agencies shall provide an electronic link to the current list of certified minority and women-owned business enterprises to each prospective contractor.

(d) In determining appropriate goals for a particular State contract, State agencies shall give consideration to the following factors:

(1) whether the procurement may be made under the State agency's discretionary purchasing authority pursuant to New York State Finance Law, in accordance subdivision (f) of this section;

([1]2) the contract and subcontract scope(s) of work;

([2]3) the potential subcontract opportunities available in the prime contract;

([3]4) the relevant availability data and industry specific disparities contained within the disparity study with respect to the scope of the contract and potential subcontracting opportunities;

([4]5) the number and types of certified minority[-] and/or women-owned business enterprises found in the Directory[directory of certified minority and women-owned businesses] available to perform the State contract work;

([5]6) the geographic location of the contract performance;

([6]7) the extent to which geography is material to the performance of the contract;

([7]8) the ability of certified minority and women-owned enterprises located outside of the geographic location of contract performance, notwithstanding the regional location of the certified enterprise, to perform on the State contract;

([8]9) the total dollar value of the work required by the State contract in relation to the dollar value of the subcontracting opportunities;

([9]10) the relationship of the monetary size and term of the State contract to the monetary size and term of the project for which the State contract is awarded; and

([10]11) the agency's annual agency-specific goal established pursuant to section 141.2 of this Title [these regulations].

(e) In the event that a State contract is entered into on an emergency basis or where an amendment or change order has been added to a State contract providing for a total expenditure in excess of \$25,000, the contracting agency may require the contractor to submit a utilization plan and to comply with the post award requirements of this Part during the life of the contract.

(f) When procuring a vendor for a State contract, State agencies should consider whether the procurement may be made under the State agency's discretionary purchasing authority pursuant to New York State Finance Law.

(1) Where the State agency elects not to use its discretionary purchasing authority, contract goals must be assessed pursuant to subdivisions (a)-(e) of this section.

(2) Where the State agency elects to use its discretionary purchasing authority to award the State contract to a permitted discretionary purchase vendor other than a certified minority and/or woman-owned business enterprise, contract goals must be assessed pursuant to subdivisions (a)-(e) of this section.

(3) Where the State agency elects to use its discretionary purchasing authority to award a State contract to a certified minority and/or woman-owned business enterprise, contract goals do not need to be assessed. If the certified business enterprise is unable to self-perform the entire contract, the State agency shall require the certified business enterprise to submit a utilization plan prior to approving the contract.

Section 142.3. Diversity practices, bidding and award considerations.

(a) The contracting State agency shall determine whether it is practical, feasible and appropriate to include in the evaluation of bids or proposals the diversity practices of all contractors making submissions for the award of any State contract that is:

(1) awarded on the basis of best value, or otherwise awarded as a response to a request for a proposal and/or a request for qualifications; and

- (2) anticipated to result in an award of two hundred fifty thousand dollars (\$250,000) or greater; and
 - (3) not a contract based on lowest price.
- (b) A determination by a contracting agency as to whether it is practical, feasible and appropriate to assess the diversity practices of all contractors making such submissions shall include consideration of the following:
- (1) nature of the labor, services, supplies, equipment and materials being procured;
 - (1) method of procurement undertaken to make the award; and
 - (2) availability of certified minority and women-owned business enterprises for contract performance.
- (c) If a contracting agency makes a determination that the evaluation of diversity practices is not practicable, feasible, or appropriate for a subject State contract, such determination shall be supported by findings in writing.
- (d) After a determination has been made to assess the diversity practices of prime contractors submitting bids or proposals in connection with the award of a State contract, the contracting agency shall require the submission of diversity practices information as part of a contractor's bid or proposal and establish a quantitative factor for scoring diversity practices.
- (e) Diversity practices information submitted for assessment by all contractors must be fully documented and, if required by the director, subject to audit. Such submissions shall include, but not necessarily be limited to, the following:
- (1) The percentage of such prime contractor's gross revenues involving the use of minority[-] and/or women-owned business enterprise subcontractors for servicing clients and/or manufacturing products and/or performing on contracts in the contractor's prior fiscal year of business activity;
 - (2) The percentage of such contractor's gross revenues involving the use of joint ventures, partnerships, or other similar arrangements with certified minority and/or women-owned business enterprises in the contractor's prior year of business activity;
 - (3) The percentage of such contractors' gross revenues that the contractor paid to certified minority and/or women-owned business enterprise subcontractors and paid to certified minority and/or women-owned business enterprise joint ventures, partnerships, or other similar arrangements;
 - (4) The percentage of such contractor's non-contract related/overhead expenses for the prior fiscal year of business activity that were certified minority and/or women-owned business enterprise expenditures;
 - (5) Any training or mentoring programs provided for certified minority and/or women-owned business enterprises by such contractor.

- (6) Any supplier and subcontractor diversity goals involved in such contractor's procurements.
 - (7) Any established goals for certified minority and/or women-owned business enterprise suppliers or a total purchasing budget allocated to certified minority and/or women-owned business suppliers by such contractors.
 - (8) The utilization plan for the award as required by section 142.4 of this Part; and
 - (9) Any other information that demonstrates such contractor's commitment to diversity practices.
- (f) The director shall provide each State agency with numerical guidelines for assessing a contractor's past, present and prospective practices and policies with respect to:
- (1) utilizing certified minority[-] and/or women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers;
 - (2) entering into partnerships, joint ventures or other similar arrangements with certified minority[-] and/or women-owned business enterprises as defined in this Part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority[-] and women-owned business enterprises; and
 - (3) any other information requested by the State agency or activities that demonstrate the contractor's commitment to a policy of diversity practices related to minority[-] and/or women-owned business enterprises.
- (g) When numerical guidelines pursuant to subdivision (f) of this section or other numerical guidelines created by the State agency and submitted to and approved by the director, are used in the assessment of a response to a bid or proposal, it shall be included in the solicitation. The assessment is to be used as one of the factors in determining the award of such a contract.
- (h) Nothing in this section shall prevent the director from establishing, notwithstanding subdivision (e) of this section, contract specific numerical guidelines for individual State contracts where necessary.

Section 142.4. Utilization plans.

- (a) State agencies shall require contractors to submit utilization plans for achieving contract goals established for the participation of certified minority and women-owned business enterprises performing commercially useful functions in relation to State contracts. A form for the utilization plan shall be provided by the State agency to the contractor for any request for bids, proposals or qualifications, or negotiated contracts, for which contract goals are established with:
- (1) bid documents where a State contract is awarded pursuant to solicitation of bids;

(2) requests for proposals or qualifications in the case of State contracts awarded pursuant to a request for proposals or qualifications; and

(3) proposed contracts where a State contract will be awarded pursuant to negotiation without solicitation of bids or a request for proposals.

(b) Utilization plan forms submitted by contractors shall include, at a minimum, the following required information:

(1) the name, address and telephone number of the contractor;

(2) the federal identification number of the contractor;

(3) the name, address[names, addresses], and New York State Minority-and Women-Owned Business Enterprise Certification File Identification Number[federal identification numbers] of each certified minority and/or women-owned business enterprise[enterprises] which the contractor intends to use to perform a commercially useful function on the State contract;

(4) [and]a description of the [contract]scope of work [which]the contractor intends to subcontract to the certified minority and/or women-owned business enterprise(s)[structure] to achieve maximum feasible participation pursuant to the prescribed State contract goals;

(5) the industry codes assigned by the division to each certified minority and/or women-owned business enterprise relevant to the scope(s) of work the business enterprise is intended to perform;

([4]6) the estimated or, if known, actual dollar amounts to be paid to and performance dates of each component of a State contract which the contractor intends to be performed by a certified minority and/or woman-owned business enterprise; and

([5]7) a statement that the utilization of certified minority and/or women-owned business enterprises for non-commercially useful functions may not be counted towards utilization of certified minority and/or women-owned business enterprises in the utilization plan.

(c) In the event that a contractor responding to a State agency's solicitation is a joint venture, teaming agreement, or other similar arrangement that includes a certified minority and/or women-owned business enterprise, such a contractor must submit the following to the State agency for its review and approval:

(1) the name, address, telephone number, and New York State Minority-and Women-Owned Business Enterprise Certification File Identification Number[federal identification numbers] of each partner or party to the agreement;

(2) the New York State Minority-and Women-Owned Business Enterprise Certification File Identification Number[federal identification numbers] of the joint venture or entity established to respond to the solicitation, if applicable;

(3) a copy of the joint venture, teaming agreement, or other similar arrangement, which describes the percentage of interest owned by each party to the agreement and the value added by each party; and

(4) a copy of the mentor-protege agreement between the parties, if applicable, and if not described in the joint venture, teaming agreement, or other similar arrangement.

(d) To the extent practicable, upon completion of the restrictive period of a procurement, each contracting agency when notifying a contractor of a winning bid award shall also notify any minority or women-owned business enterprise identified in the contractor's submitted utilization plan of such contractor's receipt of the winning bid award. Upon completion of the restrictive period of a procurement, each contractor of a winning bid award shall also provide written notice to any minority or women-owned business enterprise identified in the contractor's submitted utilization plan of such contractor's receipt of the winning bid award. Notice by a contracting agency of a minority or women-owned business being placed on a utilization plan that is part of a contractor's winning bid, does not guarantee that such minority or women-owned business will be selected to perform work on that contract.

(e) The contractor shall make a good faith effort to engage each certified minority or women-owned business enterprise identified in the approved utilization plan. Any modifications to the approved utilization plan after the contract has been awarded shall require the contractor and the state contracting agency to comply with the process outlined in section 142.6 of this Part.

([e]f) Certified minority and/or women-owned business enterprises may list themselves on utilization plans toward the achievement of prescribed certified minority [and]or women-owned business enterprise contract goals.

([f]g) Proceeds from State contracts that are paid to certified minority and/or women-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

Section 142.5. Posting of utilization plans.

(a) Upon execution of a State contract, State agencies shall post the utilization plan or waiver consistent with [Section]section 141.6(b) [of Part 141] of this Title and section 142.[7]8(e) of this Part 142 [of this Title], if granted, and the following information on the State agency's website within ten (10) days after approval by a State agency:

- (1) the name and address of the contractor;
- (2) the contract number;
- (3) the project number, if applicable;

- (4) the contract award date;
- (5) the estimated date of completion;
- (6) the amount obligated under the contract;
- (7) a description of work required by the State contract as provided to the Comptroller of the State, where applicable;
- (8) the name and address of each certified minority and/or women-owned business enterprise listed[enterprises referenced] in the utilization plan [and];
- ~~[(8)9] a description of the scope(s) of~~[and contract] work each certified minority and/or women-owned is intended to[they shall] perform, and the industry or commodity codes assigned by the division to such enterprises; and
- ~~[(9)10] a description of any waivers granted.~~

(b) After commencement of contract work, any waivers of compliance issued by the contracting agency or modifications to the utilization plan shall be posted on the State agency's website within ten (10) days of the contracting agency making such a decision.

Section 142.6. Submission and review of utilization plans.

- (a) In the case of a request for proposals, request for qualifications, or negotiated State contracts, for which contract goals have been set, the time for submitting the utilization plan shall be upon submission of any proposal, qualifications, or negotiated contract. The State agency may waive or modify this requirement by sending a written notice to the director with an explanation ten (10) days before solicitations are issued.
- (b) In the case of any bid submission, utilization plans shall be submitted after the opening of bids, but in no case more than ten (10) business days after the contractor receives notice from a State agency that the contractor has submitted a low bid, provided the agency may adopt a longer time period for submission of utilization plans as to all or particular categories of its contracts upon filing of such period and any supporting justification with the director, and subject to rejection or modification by the director. Any such modification or rejection shall apply to contract solicitations on or after the date of the rejection or modification.
- (c) The State agency shall review a utilization plan submitted by a contractor and issue a written notice of acceptance or deficiency regarding the utilization plan no later than twenty (20) days after receipt of the utilization plan, and prior to the execution of the contract resulting from said procurement. A State agency may accept a utilization plan if:
 - (1) the contract goals, as determined by the State agency in the solicitation or bid, are to be provided by one or more certified minority and/or women-owned business enterprises;

- (2) the contractor submits a utilization plan which only partially satisfies the contract goals set forth in the solicitation, but is supported by the contractor's documented good faith efforts to submit a utilization plan as requested;
 - (3) the contractor is a joint venture, teaming agreement, or other similar arrangement, with a certified minority or women-owned business enterprise whose value added or participation is equal to the percentage of the contract goals set forth in the solicitation;
 - (4) the contractor submits a mentor-protege agreement acceptable to the agency, which does not meet the goals set forth in the solicitation, but reflects an investment by the mentor in the protege roughly equal to the difference between the contract goals set forth in the solicitation and the percentage of value added participation provided by the protege.
- (d) The notice of deficiency regarding the utilization plan shall include the following information:
- (1) a statement that the contract shall not be awarded until a utilization plan has been approved or a waiver granted;
 - (2) a specific request for the reasons why any certified minority or women-owned business enterprise was not selected to perform the scope of work which the State agency has determined can be reasonably structured by the contractor into subcontract(s) or other component(s) for purposes of complying with the State contract certified enterprise goal(s); and
 - (3) any other facts relevant to the utilization plan.
- (e) Unless otherwise specified in the information, instructions or requirements and any addenda provided to contractors for purposes of soliciting bids or proposals, a contractor must provide a State agency with a written remedy in response to a notice of deficiency within seven (7) business days of its receipt.
- (f) If the contractor's written remedy to a notice of deficiency is not timely provided or if the written notice is found by the State agency to be inadequate such a failure to remedy the deficiency may be grounds for disqualification for non-responsiveness or the State agency may notify the contractor and request the contractor to submit a waiver form within five (5) business days. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid for non-responsiveness.
- (g) Failure of the contractor to comply with the requirements of section 142.6(e) may result in the disqualification of the contractor under this Part.
- (h) The time requirements of this section shall apply unless otherwise agreed to in writing by the State agency and the contractor.

(i) If a contractor changes its utilization plan after submission, it shall be required to notify the State agency in writing of such change and obtain approval from the State agency in accordance with this section and section 142.9[8] of this Part.

(1) Before a request to modify the utilization plan can be submitted, at least one of the following conditions must be met:

(i) The certified business enterprise is non-responsive despite documented attempts by the contractor to engage the certified business enterprise in subcontracting work. These attempts include:

(a) notification to the email listed on the certified business enterprise's certification record;

(b) notification in writing to the mailing address listed on certified business enterprise's certification record; and

(c) phone call(s) to the number listed on the certified business enterprise's certification record.

(ii) The certified business, in writing, declines to provide the goods or services negotiated at the time the business was listed on the utilization plan.

(iii) The certified business is no longer certified.

(iv) The certified business, in writing, attests that it is unable to provide a commercially useful function identified in the utilization plan.

(v) The contractor has identified additional subcontracting opportunities that may require additional certified businesses to be added to the utilization plan.

(2) For conditions in subparagraphs (i)-(iv) of this subdivision, before the State agency approves the modified utilization plan, the State agency must send the modified utilization plan to all certified minority and/ or women-owned business enterprises on the original utilization plan and provide the condition(s) identified by the contractor which led to the modification.

(i) If a contractor plans to remove a certified business enterprise from its utilization plan, the State agency shall provide up to 10 days for the removed business to ask questions or provide comments following the modification notice required in paragraph (2) of this subdivision. The State agency should respond to any questions or comments within 10 days of receipt.

(3) The proposed modified utilization plan along with any related questions, comments, or responses from the certified business enterprise shall be sent to the division for review. Upon confirmation of the completion of the review by the division, the modified utilization plan shall be posted on the State agency's website, replacing the original utilization plan.

Section 142.7. Utilization credit.

(a) A State agency shall receive credit, in accordance with the rates provided in subdivision (b) of this section, towards its contract utilization goal for the amount of dollars paid to a certified minority and/or women-owned business enterprise only if:

(1) The certified business enterprise provided a commercially useful function on the contract.

(2) At the time of contract, the certified business enterprise was listed on the Directory; and

(i) where a certified business enterprise is denied recertification, payments made to such business enterprise shall be credited towards the State agency's contract utilization goal on any State contract executed before the firm is removed from the Directory.

(3) At the time of contract, the industry codes assigned by the division to the certified business enterprise aligned with the scope of work for which the certified business enterprise was paid to perform.

(4) The certified business enterprise must have been listed on the approved utilization plan.

(b) The utilization of certified minority and/or women-owned business enterprises on a State contract should be credited in the following manner:

(1) Certified minority and/or women-owned prime contractors. Where a certified minority and/or women-owned business enterprise is the prime contractor on a State contract, utilization credit is limited to the dollar amount paid to the prime contractor for the specific scope of work which was self-performed. If any amount of work or fulfilment was completed by a non-certified entity, that amount cannot be counted towards utilization.

(2) Certified minority and/or women-owned business enterprise subcontractors. Where a certified minority and/or women-owned business enterprise is the subcontractor on a State contract, utilization credit is limited to the dollar amount paid to the subcontractor for the specific scope of work which was self-performed, in accordance with the following rates. Each classification and corresponding rate below should be applied based on the scope(s) of work. Subcontractors may have more than one classification on any given contract based on the scope(s) of work performed.

(i) Construction contracts.

(a) Service providers. 100 percent (100%) of the dollar amount paid to a certified minority and/or women-owned service provider for the relevant scope(s) of work shall be credited towards the utilization goal. If an

insignificant sum of materials is provided by the service provider, consistent with standard industry practices, the entire dollar amount paid to the service provider, including the value of materials, may be credited towards the utilization goal based on the service provider rate.

(b) Manufacturers. 100 percent (100%) of the dollar amount paid to a certified minority and/or women-owned manufacturer for the relevant scope(s) of work shall be credited towards the utilization goal.

(c) Suppliers. 60 percent (60%) of the dollar amount paid to a certified minority and/or women-owned supplier shall be credited towards the utilization goal.

(d) Distributors. 40 percent (40%) of the dollar amount paid to a certified minority and/or women-owned distributor for the relevant scope(s) of work shall be credited towards the utilization goal.

(e) Brokers. 10 percent (10%) of the dollar amount paid to a certified minority and/or women-owned broker for the relevant scope(s) of work shall be credited towards the utilization goal.

(ii) Non-construction contracts.

(a) Service providers. 100 percent (100%) of the dollar amount paid to a certified minority and/or women-owned service provider for the relevant scope(s) of work shall be credited towards the utilization goal.

(b) Manufacturers. 100 percent (100%) of the dollar amount paid to a certified minority and/or women-owned manufacturer for the relevant scope(s) of work shall be credited towards the utilization goal.

(c) Suppliers. 100 percent (100%) of the dollar amount paid to a certified minority and/or women-owned supplier for the relevant scope(s) of work shall be credited towards the utilization goal.

(d) Distributors or OGS Centralized Contract Resellers. 40 percent (40%) of the dollar amount paid to a certified minority and/or women-owned distributor for the relevant scope(s) of work shall be credited towards the utilization goal.

(e) Brokers. 10 percent (10%) of the dollar amount paid to a certified minority and/or women-owned broker for the relevant scope(s) of work shall be credited towards the utilization goal.

(3) Pursuant to this section, the minority and/or women-owned business enterprise providing services, materials, supplies or brokered materials or supplies must be identified in the utilization plan with applicable industry and/or commodity codes prior to commencing the work.

(c) Any dollar amount paid to a certified minority and/or women-owned business enterprise whose role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation will not be credited towards the State agency's contract utilization goal.

Section 142.[7]8. Waivers.

(a) A State agency shall not grant any automatic waivers of goal requirements on a State contract. A State agency[but] may grant a partial or total waiver of goal requirements established on a State contract only upon the submission of a waiver form by a contractor. In addition to the waiver form, the contractor must include documentation demonstrating[documenting] good faith efforts, as defined in [Section] section 142.[8]9 of this Part, by the contractor to meet the goal requirements of the State contract, and in consideration of the following factors:

- (1) the number and types of certified minority and/or women-owned business enterprises available to perform on any subcontractable scopes of the contract;
- (2) the total dollar value of the State contract;
- (3) the contract scope of work to be performed;
- (4) the project size;
- (5) the project term;
- (6) the availability of other business enterprises located in the region qualified to do the work to be performed;
- (7) the ability of certified minority and/or women-owned business enterprises located outside the region to perform the State contract;
- (8) Whether the certified minority and/or women-owned businesses which have been solicited by the contractor exhibited interest in submitting proposals for a particular project by attending, or having attended, a pre-bid conference, if any, scheduled by the State agency awarding the State contract with certified minority and/or women-owned business enterprises;
- (9) Whether the contractor provided timely written notification of subcontracting opportunities on the State contract to appropriate certified businesses that appear in the Directory [directory of certified businesses]prepared pursuant to paragraph (f) of subdivision three of section 311 of the Executive Law; and
- (10) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge the contractor's duties pursuant to this Part or article 15-A of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals.

(b) Requests for a partial or total waiver of goal requirements established on a State contract made prior to the award of the contract may be made simultaneously with the submission of the utilization plan for that State contract. If a contractor is found non-responsive or non-responsible by a State agency, the request for a waiver shall be deemed moot.

(c) Requests for a partial or total waiver made subsequent to award of a State contract may be made at any time during the term of the State contract but prior to the submission of a request for final payment on that contract.

(d) Forms for requests of a partial or total waiver of goal requirements established on a State contract, shall include a request for the following information, where applicable:

(1) the names of general circulation, media, trade association and minority and women-oriented publications in which bids were solicited for purposes of complying with goal requirements established for certified minority and women-owned business enterprise participation;

(2) the dates for which bid solicitations for certified minority and women-owned business participation were published in any of the publications named pursuant to paragraph (1) of this subdivision and the text of the bid solicitation;

(3) a list of certified minority and women-owned business enterprises appearing in the Directory[directory] which were solicited in writing to provide bids for purposes of complying with a State agency's goal requirements for certified minority and women-owned business enterprise participation;

(4) proof of dates on which such solicitations were made in writing and copies of solicitations made, or a sample copy of the solicitation if an identical solicitation was made of all certified minority and women-owned business enterprises;

(5) copies of responses made by certified minority and women-owned business enterprises to solicitations made by the contractor;

(6) a description of any contract documents, plans or specifications made available to certified minority and women-owned business enterprises for purposes of soliciting their bids, and the dates and manner in which these documents were made available;

(7) documentation of any negotiations between the contractor and[/or] certified minority and women-owned business enterprises undertaken for purposes of complying with goal requirements established for certified minority and women-owned business enterprise participation;

(8) any other information determined relevant by the State agency or the contractor;
and

(9) a statement setting forth the contractor's basis for requesting a partial or total waiver.

(e) Upon the issuance of all waivers of compliance, the contracting agency shall publish on its website on a monthly basis, if practicable, but no less than on a quarterly basis:

- (1) Information identifying the contract, including the value of the contract;
- (2) The name of the contractor receiving the waiver;
- (3) The date of the waiver; and
- (4) The specific contract provisions to which the waiver applies.

(f) The division may require State agencies to submit requests for waivers for compliance review prior to final approval. The director of the division shall not participate in such compliance review.

Section 142.9[8]. Contractor's efforts to utilize certified business enterprises.

(a) Contractors must document their good faith efforts toward utilizing certified minority and/or women-owned business enterprises, including but not limited to, those identified within a utilization plan. Such documented efforts, shall include, at a minimum:

(1) Copies of searches performed in the Directory based on industry or commodity codes relevant to the scopes of work applicable to the State contract.

[[1]2) Copies of its solicitations of certified minority and/or women-owned business enterprises and any responses thereto[;].

[[2]3) If responses to the contractor's solicitations were received, but a certified minority or woman-owned business enterprise was not selected, the specific reasons that such enterprise was not selected[;].

[[3]4) Copies of any advertisements for participation by certified minority and women-owned business enterprises timely published in appropriate general circulation, trade and minority or women-oriented publications, together with the listing(s) and date(s) of the publication of such advertisements.[;]

[[4]5) The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the State agency awarding the State contract, with certified minority and women-owned business enterprises which the State agency determined were capable of performing the State contract scope of work for the purpose of fulfilling the contract participation goals[;].

[[5]6) Information describing the specific steps undertaken to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified minority and women-owned business enterprises.

(b) In addition to the information provided by the contractor in subdivision (a) above, the State agency may also consider the following to determine whether the contractor has demonstrated good faith efforts:

- (1) where applicable, whether the contractor submitted an amended utilization plan consistent with the subcontract or supplier opportunities in the contract;
- (2) the number of certified minority and/or women-owned business enterprises in the region listed in the Directory[directory of certified businesses] that could, in the judgment of the State agency, perform work required by the State contract scope of work;
- (3) the actions taken by the contractor to contact and assess the ability of certified minority and women-owned business enterprises located outside of the region in which the State contract scope of work is to be performed to participate on the State contract;
- (4) whether the contractor provided relevant plans, specifications or terms and conditions to certified minority and women-owned business enterprises sufficiently in advance to enable them to prepare an informed response to a contractor request for participation as a subcontractor or supplier;
- (5) the terms and conditions of any subcontract or provision of suppliers offered to certified minority and/or women-owned business enterprises and a comparison of such terms and conditions with those offered in the ordinary course of the contractor's business and to other subcontractors or suppliers of the contractor;
- (6) whether the contractor offered to make up any inability to comply with the certified minority and women-owned business enterprises goals in the subject State contract in other State contracts being performed or awarded to the contractor;
- (7) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge contractor's duties pursuant to this Part or article 15-A of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals;
- (8) whether the contractor knowingly utilized one or more certified minority and/or women-owned business enterprises, in the performance of the subject State contract, that contractor knew or reasonably should have known could not perform a commercially useful function;
- (9) whether the contractor submitted compliance reports pursuant to section 142.[11]12 of this Part, which identified certified minority and/or women-owned business enterprises that contractor knew or reasonably should have known did not perform a commercially useful function on a State contract on which goals were assigned pursuant to section 142.2 of this Part; and
- (10) any other information that is relevant or appropriate to determining whether the contractor has demonstrated a good faith effort.

Section 142.10[9]. Contractor disqualification.

(a) Where a State agency determines, after having given notice of deficiency pursuant to section 142.6(c) of this Part, that a contractor has failed to submit an acceptable utilization plan or satisfactorily document its good faith efforts, the State agency may proceed with the next ranked bidder:

(1) twelve (12) days after sending a written notice of deficiency, as specified in section 142.6 of this Part, to the contractor, and the State agency has not received a request for an administrative hearing from the contractor,

(2) after the mailing of a notice of disqualification, specifying the grounds for such disqualification, provided that the contractor has not filed a complaint with the director, or

(3) after receiving a written notification of a resolution from the director, or a decision of the division's hearing officer.

(b) The State agency shall serve a copy of its complaint upon the contractor by personal service or certified mail, return receipt requested.

(c) A contractor who has received a written notice of disqualification may, within five (5) days of receipt of such a notice, file a complaint with the director pursuant to [Section]section 316 of the Executive Law. The contractor shall serve a copy of its complaint upon the director and the State agency by personal service or certified mail, return receipt requested.

Section 142.11[10]. Contractor compliance reporting.

(a) State agencies are responsible for determining compliance by contractors with goals established in State contracts.

(b) A State agency may determine that a contractor is complying with contract goals set forth in the utilization plan if:

(1) the contractor is a certified minority or women-owned business enterprise and is responsible for one hundred percent of the contract performance;

(2) the State agency has verified that the contract goals are being achieved with certified, value added enterprises; or

(3) a review of contractor compliance reports and the determination of compliance is consistent with procedures or actions described in the State agency's master goal plan.

Section 142.12[11]. Contractor compliance reports.

(a) Contractor compliance reports shall be submitted by contractors with respect to State contracts for which a utilization plan was required and approved by a State agency.

(b) Contractor compliance reports shall be filed at intervals required by information, instructions or requirements pursuant to which bids and proposals have been solicited, or the terms and conditions of a State contract awarded pursuant to negotiation.

(c) A contractor compliance report shall include, but not be limited to, the following information:

(1) the name, address and telephone number of each certified minority and/or woman-owned business enterprise the contractor is using or intends to use to comply with the utilization plan;

(2) a brief description of the contract scope of work to be performed for the contractor by each certified minority or woman-owned business enterprise and the scheduled dates for performance;

(3) a statement of whether the contractor has a written agreement with each certified minority or woman-owned business enterprise, and if requested, copies of such agreements the contractor is using or intends to use;

(4) the actual total cost of the contract scope of work to be performed by each certified minority or woman-owned business enterprise for the contract; and

(5) the actual amounts of any payments made by the contractor to each certified minority or woman-owned business enterprise as of the date the compliance report was submitted.

(6) a statement indicating that the contractor complied with the requirement to provide written notice to any minority or women-owned business enterprise identified in the contractor's submitted utilization plan, of such contractor's receipt of the winning bid award. Upon request by an agency, a contractor must provide copies of the written notification that it sent to the minority or women-owned business enterprises that were identified in the contractor's utilization plan submitted in conjunction with its bid, in accordance with Section 142.4(d).

(d) Proceeds from State contracts that are paid to certified minority and/or women-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

Section 142.13[12]. Contractor and State agency complaints.

(a) Subsequent to the award of a State contract to a contractor that becomes deficient with regard to its utilization plan, the contractor may file a complaint with the director pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, provided that the complaint is filed within twenty (20) days following paragraphs (1), (2), or (3) of this subdivision. The complaint should state the reasons for the information:

- (1) the contractor's receipt of a written determination by a State agency that the contractor is not entitled to a partial or full waiver of the goals established in a State contract for participation by certified minority and women-owned business enterprises; or
- (2) the contractor's receipt of a written determination by a State agency that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals; or
- (3) twenty (20) days have passed from the date of the State agency's receiving a written request from the contractor, sent by certified mail, return receipt requested, for a partial or total waiver of goal requirements for participation by certified minority and women-owned business enterprises, and no written determination has been issued by the State agency.

(b) Within twenty (20) days of the State agency determination that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals for participation by certified minority and/or women-owned business enterprises established in the State contract, a State agency may:

- (1) after giving the contractor an opportunity to be heard, make a determination that the contractor has failed to meet the contract goals and assess liquidated or such other damages as were identified in the contract; or
- (2) file a complaint with the director, pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, accompanied by the reasons for the State agency's determination for which the complaint is filed, together with a demand for relief, [such as debarment,]damages or fines pursuant to the terms.

(c) A copy of any complaints filed with the director shall also either be personally served or mailed certified mail, return receipt requested, by the party making the complaint to the party against whom the complaint is being filed.

(d) Upon receipt by the director of a complaint, the party against whom the complaint has been filed shall be provided with an opportunity to respond to the complaint. If within thirty (30) days of receipt of the complaint, the director is unable to resolve the complaint to the satisfaction of the State agency and the contractor, the complaint shall be referred to the division's hearing officer for a hearing. The hearing shall be held in accordance with the procedures outlined in section 145.3 of this Title.

(e) Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract or the refusal of the State agency to grant a waiver request by the contractor. The decision of the hearing officer with respect to an alleged violation of the State contract or the refusal of the State agency to grant a waiver shall be final and may only be vacated or modified as provided in article seventy-eight of the civil practice law and rules upon an application made within the time provided by such article.

(f) Upon conclusion of the administrative hearing and the rendering of a decision, the hearing officer shall also recommend to the director a remedy, including, if appropriate, the imposition of sanctions, fines or penalties, pursuant to Executive Law, section 316.

(g) The director, within ten (10) days of receipt of the decision, shall file a determination with regard to the imposition of any fines, sanctions or penalties, pursuant to Executive Law, section 316, and shall cause a copy of such determination to be served upon the contractor by personal service or by certified mail, return receipt requested.

(h) The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed five years following the final determination. The division shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

(i) The determination of the director as to the imposition of any fines, sanctions or penalties shall be final and may only be vacated or modified as provided in article 78 of the Civil Practice Law and Rules upon an application made within the time provided by such article.

Section 142.14[13]. Provisions in contracts; violations; [and debarment]penalties and damages.

(a) Pursuant to Executive Law, section 316-a, [Every]every contracting agency shall include a provision in its State contracts expressly providing that any contractor who willfully and intentionally fails to comply with the minority and women-owned participation requirements of these regulations as set forth in such State contract shall be liable to the contracting agency for liquidated or other appropriate damages, as otherwise specified in the contract, and shall provide for other appropriate remedies on account of such breach.

(b) Damages for willfully and intentionally failing to meet the minority and women-owned business participation requirement shall be calculated based on the actual cost incurred by the State agency related to the State agency's expenses for personnel, supplies and overhead related to establishing, monitoring, and reviewing certified minority and women-owned business enterprise programmatic goals and Affirmative Action and Equal Opportunity compliance, or the amount stated in the solicitation as liquidated damages. A contracting agency that elects to proceed against a contractor for breach of contract as provided in this section shall be precluded from seeking enforcement pursuant to section three hundred sixteen of the Executive Law and section 142.13 of this Title. The contracting agency shall, however, include a summary of all enforcement actions undertaken pursuant to this section in its annual report submitted pursuant to subdivision three of section three hundred fifteen of the Executive Law.

(c) Upon the receipt of evidence that a minority and/or women-owned business enterprise failed to perform a commercially useful function for which utilization credit was claimed, the director shall conduct a review and may assess penalties against the prime contractor and/or the certified business enterprise for up to three (3) years following the contract completion. Before such penalties are assessed the director shall:

(1) Upon the initiation of such review, request the following applicable documentation, which the contracting State agency shall provide within twenty (20) business days of request:

(i) the approved utilization plan identifying the certified business enterprise;

(ii) the executed contract, purchase order, or agreement defining the scope of the work to be self-performed by the certified business enterprise;

(iii) invoices issued by the certified business enterprise for work represented as self-performed; and

(iv) written attestations from both the prime contractor and the certified business enterprise affirming that the commercially useful function identified in the approved utilization plan was self-performed by the certified business enterprise.

(2) Within twenty (20) business days of receipt of the contracting State agency's documentation, issue a written determination as to whether the certified business enterprise performed a commercially useful function and serve the written determination upon the business enterprise by certified mail, return receipt requested.

(i) If the director determines that the prime contractor claimed utilization credit for work that did not constitute a commercially useful function, the director may:

(a) assess a monetary penalty not exceeding the value of the improperly credited work; or

(b) disallow the prime contractor from claiming minority and/or women-owned business enterprise utilization credit for up to one (1) year, with notice to state agencies.

(ii) If the director determines that a certified business enterprise failed to perform a commercially useful function, the director may remove such business from the Directory for up to six (6) months, during which utilization of such business on any State contracts shall not be credited.

(3) The director may impose the penalties set forth in this subdivision, pursue additional remedies and/or may proceed concurrently with the revocation, in accordance with section 144.5 of this Title, or debarment process, where appropriate.

(4) Within twenty (20) business days from receipt of the written determination, the business enterprise may appeal the determination. The appeal shall be conducted in accordance with sections 145.3(b)-(h) of this Title.

(5) Nothing in this subdivision shall be construed as a determination of fraud or fraudulent conduct. The determinations and penalties imposed pursuant to this subdivision are administrative in nature and relate solely to utilization credit claimed for work that did not constitute a commercially useful function. Where the division identifies conduct that may constitute fraud, such matters shall be referred to the appropriate authority for review and may be subject to revocation, under section 144.5 of this Title, and/or debarment.

(d) The director shall establish guidelines for the implementation of a debarment process which includes notice of hearing and referral to the division's hearing officer for a hearing. The hearing shall be held in accordance with section 145.3 of this Title. [The penalties or debarment imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed five years following the final determination. The division shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.]

Section 142.15[14]. Quantitative scoring factors for State contracts.

(a) On contracts where State agencies do not assess diversity practices pursuant to section 142.3 of this Part, State agencies may establish and include a quantitative factor in the scoring of bids or proposals submitted to agencies for bidders that are certified minority[-]and/or women-owned business enterprises.

PART 143. WORK FORCE DIVERSITY REQUIREMENTS
AND PROCEDURES REGARDING EQUAL EMPLOYMENT
OPPORTUNITIES FOR MINORITY GROUP MEMBERS AND
WOMEN ON STATE CONTRACTS

Section 143.1. Purpose, scope and applicability.

(a) The requirements of this Part apply to all documents soliciting bids or proposals for State contracts which are issued on or after the effective date of this Part.

(b) In the event that a State contract is entered into on an emergency basis or where an amendment or change order has been added to a State contract providing for a total expenditure in excess of \$ 25,000, the contracting agency may require the contractor to submit an EEO policy statement and to comply with the post award requirements of this Part during the life of the contract.

(c) Pursuant to Executive Law, section 312(3), the requirements of this Part shall not be binding upon contractors or subcontractors in the performance of work or the provision of services or any other activity that are unrelated, separate or distinct from the State contract as expressed by its terms.

(d) Based on the restrictions set forth in the applicability provisions of Executive Law, section 312(6), the requirements of sections 143.4 and 143.6 of this Part shall not apply to any employment outside this State or application for employment outside this State or solicitations or advertisements therefor.

Section 143.2. General work force diversity requirements for State agencies awarding contracts.

(a) State agencies shall include in their master goal plan submitted pursuant to section 141.3 of this Title, steps the agency will take to implement and to ensure compliance with the EEO requirements of this Part for approval by the director. The agency shall annually provide relevant updated information as a part of the agency master goal plan submission process.

(b) The director shall provide all contracting agencies with the labor force availability data on federal occupational categories upon request. Contracting agencies shall include relevant portions of such data in all documents soliciting bids or proposals for State contracts or provide the data to contractors within the time frame established by the agency for a contractor's pre-award submission of an EEO policy statement and staffing plan required by section 143.2 of this Part. The director shall make efforts to assist contractors in utilizing the data to determine the expected levels of participation of minority group members and women on State contracts.

(c) In relation to the labor force availability data, the director will provide contracting agencies guidance and assistance in identifying the relevant labor force availability pool of employees based on:

- (1) the reasonable recruitment area for the type of job category;
- (2) the location of the job; and
- (3) consideration for selecting the optimal availability pool.

(d) State agencies shall include in all State contracts and all documents soliciting bids or proposals for State contracts the following language:

- (1) As to the performance of the State contract, contractors and subcontractors shall undertake or continue programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed,

color, national origin, sex, age, disability or marital status. For these purposes, equal opportunity shall apply in the areas of recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation.

(2) Prior to the award of a State contract, the contractor shall submit an equal employment opportunity policy statement to the contracting agency within the time frame established by that agency.

(3) As a part of the contractor's EEO policy statement, the contractor, as a precondition to entering into a valid and binding State contract, shall agree to the following in the performance of the State contract:

(i) The contractor will not discriminate against any employee or applicant for employment, will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts.

(ii) The contractor shall state in all solicitations or advertisements for employees that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status;

(iii) At the request of the contracting agency, the contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate, and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein.

(4) Except for construction contracts, prior to an award of a State contract, the contractor may be required to submit to the contracting agency a staffing plan of the anticipated work force to be utilized on the State contract or, where required, information on the contractor's total work force, including apprentices, broken down by specified ethnic background, gender, and federal occupational categories or other appropriate categories specified by the contracting agency. The form of the staffing plan shall be supplied by the contracting agency.

(5) After an award of a State contract, the contractor may be required by the contracting agency to submit a workforce utilization report to the contracting agency, in a form and manner required by the agency, of the work force actually utilized on the State contract, broken down by specified ethnic background, gender, and federal occupational categories or other appropriate categories specified by the contracting agency.

(e) Where applicable, the contractor shall include the provisions of subdivision (d) of this section in every subcontract in such a manner that the requirements of the provisions will be binding upon each subcontractor as to work in connection with the State contract, including the requirement that subcontractors shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status, and, when requested, provide to the contractor information on the ethnic background, gender, and federal occupational categories of the employees to be utilized on the State contract.

(f) To ensure compliance with the requirements of this Part, a contracting agency shall inquire of a contractor whether the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force and where the work of the State contract is to be performed.

(g) A contracting agency may require the contractor to submit compliance reports, pursuant to Section 143.5 of this Part, relating to their operations and implementation of their affirmative action or equal employment opportunity program in effect as of the date the State contract is executed and may require the contractor to obtain similar reports from subcontractors utilized during the contract.

(h) If a contractor or subcontractor does not have an existing affirmative action program, the contracting agency may provide to the contractor or subcontractor a model plan of an affirmative action program. Upon request, the director shall provide a contracting agency with a model plan of an affirmative action program.

(i) Upon request, the director shall provide a contracting agency with information on specific recruitment sources for minority group members and women, and contracting agencies shall make such information available to contractors.

Section 143.3. Work force diversity bidding and award requirements.

(a) State agencies shall require as part of all bid requests and contract solicitations that the contractor submit to the contracting agency an EEO policy statement and, may require, a staffing plan, as described in section 143.2 of this Part. A contracting agency's approved master goal plan may specify, with reasons, that the pre-award submission of a staffing plan will not be required for particular contracts.

(b) Prior to the award of a State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor's and/or subcontractor's total work force (for example, certain commodities contracts), the contractor shall, where required by the contracting agency, submit to the contracting agency, in lieu of a staffing plan, information on the contractor's and/or subcontractor's total work force broken down by ethnic background, gender, and federal occupational categories or other appropriate categories specified by the contracting agency.

(c) A contractor's failure to submit an EEO policy statement and, where required by the contracting agency, staffing plan or total work force data shall result in the rejection of the

contractor's bid or proposal, unless the contractor provides the contracting agency with a reasonable justification in writing for such failure (e.g., the failure to submit a staffing plan where a contractor has a work force of 10 employees or less), or makes a commitment to submit an EEO policy statement and a staffing plan or total work force data by a date to be specified by the contracting agency.

(d) The contracting agency shall be responsible for determining the time frames for the pre-award submission of the EEO policy statement and staffing plan or total work force data and for determining whether all bidders or only the lowest responsible bidder(s) or finalists shall be required to submit such documentation.

(e) After the award of the State contract and in the case where the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force, a contracting agency may require the contractor to submit a work force employment utilization report in a form developed by the director. In instances where such a report is required, the work force employment utilization report form shall be provided to the contractor by the contracting agency at the time of the execution of the contract. The work force utilization report shall include the following information:

- (1) the total number of employees performing work on the State contract;
- (2) for commodities, services/consulting, and professional construction consultant contracts (including not-for-profit contracts within those industries), the contractor's and all subcontractor's work force on the State contract broken down by specified ethnic background, gender, and federal occupational categories; and
- (3) for construction contracts, the hours a contractor's and all subcontractor's employees worked on activities related to that contract, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant federal occupational categories.

(f) For construction contracts, a contractor shall submit to the contracting agency a work force utilization report on a monthly basis throughout the life of the contract.

(g) For all other contracts where the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force, the contracting agency shall require a contractor to submit work force utilization reports on a quarterly basis throughout the life of the contract when the contractor's and/or subcontractor's work force on the State contract changes. In the case where the contractor's and/or subcontractor's work force does not change within the quarterly period, the contractor shall so notify the contracting agency in writing.

(h) After an award of the State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor's and/or subcontractor's total work force, the contractor may submit to the contracting agency information on the contractor's and/or subcontractor's total work force broken down by specified ethnic background, gender, and federal occupational categories. Such total work force data may be submitted by the contractor to the contracting agency on a semi-annual basis

during the life of the particular State contract or during the course of an extended and ongoing contractual relationship involving various State contracts entered into between the contractor and contracting agency.

(i) For all State contracts that are bid and awarded by the Office of General Services, the Office of General Services shall be solely responsible for requiring contractors to submit work force employment utilization reports and all other required information.

Section 143.4. Contractor work force diversity compliance.

(a) Contracting agencies shall be responsible for monitoring a contractor's compliance with the requirements of this Part.

(b) In addition to general monitoring of contract performance, contracting agencies shall be responsible for conducting in-depth compliance reviews on selected State contracts during the course of the year. In addition, the number of compliance reviews a contracting agency shall conduct will be established in the agency's approved master goal plan and may be based upon such factors as the number and type of contracts the State agency awards annually.

(c) In determining which contracts should be subject to an in-depth compliance review, a contracting agency shall, in part, base its determination on the results of its comparison of the ratios of women and minority group members in a contractor's work force to the relevant availability and expected levels of participation of minority group members and women on State contracts.

(d) A contracting agency shall notify the contractor in writing of the State agency's intent to conduct a compliance review ten (10) days prior to commencing the review. The contractor shall submit and/or have available for inspection at the time of the review books, records, payroll records, and other relevant documentation of the contractor's employment of minority group members and women on a specific State contract for the period to be reviewed.

(e) If the contractor fails to provide the information requested by the State agency within ten (10) days of the request, such failure shall be deemed a material breach of contract and subject to an administrative hearing pursuant to Section 143.6 of these regulations or any other relief to which the State agency is entitled.

(f) A contracting agency shall review such documentation thoroughly to determine whether the contractor made conscientious and active efforts to employ and utilize minority group members and women on the State contract. In making its determination, the contracting agency shall evaluate the contractor's efforts based upon consideration of the following factors:

(1) whether the contractor established and maintained a current list of recruitment sources for minority group members and women, and whether the contractor provided written notification to such recruitment sources that the contractor had employment opportunities at the time such opportunities became available;

(2) whether the contractor sent letters to recruiting sources, labor unions, or authorized representatives of workers with which the contractor has a collective

bargaining or other agreement or understanding requesting their assistance in locating minority group members and women for employment;

(3) whether the contractor disseminated its equal employment opportunity policy by including it in any advertising in the news media and, in particular, minority and women news media;

(4) whether the contractor notified other contractors and subcontractors with whom it does or anticipated doing business to discuss the contractor's equal employment opportunity policy;

(5) whether internal procedures exist for, at minimum, annual dissemination of the contractor's equal employment opportunity policy to employees, specifically to employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions;

(6) whether the contractor encourages and utilizes minority group members and women employees to assist in recruiting other employees; and

(7) whether the contractor has apprentice training programs approved by the New York State Department of Labor which provide for training and hiring of minority group members and women.

Section 143.5. Work force diversity reporting requirements for contracting agencies.

(a) The director may require contracting agencies to report to the division on the information contained in the work force employment utilization reports in a form and manner required by the director quarterly on the 15th day of January, April, July, and October of each year. The contracting agency's report shall include, but is not limited to, the following information regarding the State contracts for which the State agency received work force utilization reports on during the preceding quarterly interval:

(1) an aggregation, by location of work, of the work forces employed on all State contracts in the industries of commodities, services/consulting, and professional construction consulting broken down by ethnic background, gender and federal occupational categories;

(2) for construction contracts, an aggregation, by location of work, of the hours worked during the reporting period on activities related to those contracts, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant federal occupational categories; and

(3) a list of all contracts included in the aggregation of data, contract number, contract amount and location of work.

(b) Where required by the director, contracting agencies shall submit to the division on a semi-annual basis copies of the total work force data submitted by contractors in the cases

where the work force utilized on a State contract could not be separated out from the contractor's and/or subcontractor's total work force.

(c) Where a State agency enters into a State contract with a total expenditure in excess of two hundred and fifty thousand dollars (\$250,000) contractors shall submit company workforce diversity data to the State agency prior to the execution the subject State contract. The director shall provide each State agency with a company workforce diversity data form for data collection purposes.

Section 143.6. Work force diversity dispute resolution procedure.

(a) If a contracting agency determines that a contractor is in noncompliance with the requirements of this Part, the contracting agency shall make every effort to resolve the matter and to bring the contractor into compliance with such requirements. If the contracting agency is unsuccessful in its efforts, the contracting agency shall submit a written complaint to the director, pursuant to Section 316 of the Executive Law, regarding the contractor's noncompliance and shall recommend to the director that the director review and attempt to resolve the noncompliance matter. The contracting agency shall serve a copy of its complaint upon the contractor by personal service or certified mail, return receipt requested.

(b) For all State contracts that it bids and awards, the Office of General Services shall have the function of determining a contractor's compliance with the EEO requirements of this Part.

(c) The director shall attempt to resolve a noncompliance dispute between the contracting agency and the contractor or subcontractor. If a resolution of the noncompliance dispute is satisfactory to the parties, the parties shall so indicate by signing a dispute resolution memorandum indicating that the matter has been resolved and stating the terms of the resolution.

(d) If the director is unable to resolve the noncompliance dispute to the satisfaction of the parties, the director shall refer the contracting agency's complaint, within 30 calendar days of the receipt of the complaint, to the division's hearing officer for a hearing.

(e) Upon conclusion of the administrative hearing, the hearing officer shall submit to the director a decision regarding the noncompliance dispute and the imposition of sanctions, fines or penalties, as provided for in the relevant sections of the contract, if appropriate, or a dismissal of the State agency's complaint, if appropriate.

(f) The director, within 10 business days of receipt of the decision, shall mail a determination of such matter to the contracting agency and shall cause a copy of such determination, along with a copy of article 15-A of the Executive Law to be served upon the contractor or subcontractor by personal service or by certified mail, return receipt requested.

(g) The decision of the hearing officer shall be final and may only be vacated or modified as provided in article 78 of the Civil Practice Law and Rules.

(h) Nothing in this section is meant to diminish or supersede a contracting agency's authority and responsibility to enforce the requirements of its contracts.

PART 144. STATEWIDE CERTIFICATION PROGRAM

Section 144.1. Purpose and general description.

(a) This Part implements Section 314 of the Executive Law. Section 314 of the Executive Law authorizes the director to establish rules and regulations providing for criteria for the certification of minority and/or women-owned business enterprises, procedures for the receipt and evaluation of applications to certify business enterprises as minority and/or women-owned business enterprises, and procedures for the revocation of certification of business enterprises as minority and/or women-owned business enterprises.

Section 144.2. Certification criteria.

(a) In order to be certified as a minority and/or women-owned business enterprise, a business enterprise must be owned, operated, and controlled by one or more minority group members and/or women, must be independent of other business entities, and must meet such other certification criteria as are described herein.

(b) Ownership. In order to establish real, substantial, and continuing majority ownership of a business enterprise by one or more minority group members and/or women, and to ensure that the benefits of certification accrue to such minority group members and/or women, each application to certify a business enterprise as a minority and/or women-owned business enterprise must meet the following criteria:

(1) Fifty-one (51) percent ownership interest. Minority group members and/or women relied upon for certification must own at least fifty-one (51) percent of the business enterprise for which certification is sought. Such minority group members and/or women must be United States citizens or permanent resident noncitizens. [aliens.]

(2) Restrictions on Ownership. Minority group members and/or women relied upon for certification must not be subject to undue restrictions against alienating such ownership interests. [Capital contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.]

[(i) Sources of a capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or more of the following:

1. Money;
2. Property;
3. Equipment; or
4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise,

and a reasonable assessment of the fair market value of the expertise must be clearly documented.]

(3) Risks and profits. Minority group members and/or women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein. In determining whether the profits of the business enterprise are shared proportionately with minority [group members] and/or women owners, the division may consider, for example and without limitation, means by which the proceeds of the business enterprise are conveyed to individuals or entities.

(i) Exception to Proportionality Requirement for Passive Investments: A business enterprise may satisfy the risks and profits requirement even if a passive investment, as defined in section 140.1(ii) of this Title, has been made, provided that the terms of the investment agreement, including interest rates or return on investment, do not result in profits which are disproportionate to the investor's equity interest in the business enterprise.

(4) [Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.]Pro forma ownership. Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority and/or women-owned business enterprise. Where a minority group member and/or woman relied upon for certification obtains their ownership interest in a business enterprise through a transfer from another person, such minority group member and/or woman must demonstrate that such transfer was supported by reasonable consideration, and must meet all other certification criteria described in this section.

(5) In addition, the following factor may be considered:

(i) Capital contribution. Minority group members and/or women relied upon for certification must demonstrate a capital contribution, as defined in clause (a) of this subparagraph, to the business enterprise for which certification is sought proportionate to their equity interest therein, at the time of the application.

(a) Sources of a capital contribution. Minority group members and/or women relied upon for certification may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or more of the following:

(1) money;

(2) property;

(3) equipment;

(4) expertise, provided that the contribution of such expertise must be uncompensated and specific to the type of work the business enterprise performs. A reasonable assessment of the fair market value of the expertise must be clearly documented;

(5) acquisition as a result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(6) acquisition through inheritance, as a gift from a family member or otherwise because of the death or retirement of the former owner.

(b) Exception to proportionality requirement for passive investments. A business enterprise may satisfy the capital contribution requirement even if a passive investment, as defined in section 140.1(ii) of this Title, has been made, so long as the owner relied upon for certification otherwise satisfies clause (a) of this subparagraph. The amount of the passive investment will not be included in the division's calculation when determining the proportionality of the capital contribution made by the owner relied upon for certification.

(c) Operation. Minority group members and/or women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members and/or women operate a business enterprise for which certification is sought based upon the following criteria:

(1) Competence in the industry. Minority group members and/or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things. Minority group members and/or women relied upon for certification must have the ability to critically evaluate the work performed by the business enterprise even if that work is performed by other participants in the business enterprise and to use this information to make independent decisions concerning the business enterprise's daily operations, management, and policymaking. In evaluating whether a minority group member and/or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:

(i) [Whether]whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications or if owners of the business enterprise are required to obtain a license or certification to own or to operate the business enterprise or to provide products or services to the clients of the business enterprise;

(ii) [The]the extent to which academic credentials exist for persons employed in the industry;[and]

(iii) whether the minority group members and/or women relied upon for certification have technical competence in the industry in which the business is seeking certification and can demonstrate the working knowledge and ability to operate the business enterprise; or

(iv) [The]the extent to which industry-specific expertise may be obtained via direct work experience.

(2) Operational decisions. Minority group members and/or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The minority and/or women owners may delegate various areas of management, policymaking, or daily operations of the business enterprise to other participants, but such delegations must be revocable, and the minority and/or women owners must retain the power to hire and fire any person to whom such authority is delegated. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:

(i) [The]the products or services the business enterprise provides to clients; [and]

(ii) the means by which the products or services are provided and/or delivered; and

(iii) [The]the means by which the business enterprise obtains contracts or orders.

(3) Time devoted to operation of the business enterprise. Minority group members and/or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought. The qualifying minority and/or women owners of the business enterprise cannot engage in outside employment or other business interests that conflict with the management of the business enterprise or prevent the individuals from devoting sufficient time and attention to the management of the business enterprise to control its activities.

(d) Control. Minority group members and/or women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and/or women possess such control based upon the following criteria:

(1) Control of business decisions. Minority group members and/or women relied upon for certification must control the business enterprise for which certification is sought. Any agreements describing the management of the business enterprise shall be consistent with this paragraph.

([1]2) Control of business management. [A m]Minority group members and/or [woman]women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with [the foregoing] this paragraph.

([2]3) Control of business negotiations. Minority group members and/or women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

(4) Customary incidents of ownership. Minority group members and/or women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought.

(e) Independence. Business enterprises for which certification is sought must operate independently. Their sale of goods or performance of services must constitute a commercially useful function. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following factors[criteria]:

(1) [Whether]whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;

(2) [Whether]whether the business enterprise transacts business primarily with one other entity; [and]

(3) [Whether]whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices[.];

(i) the business enterprise must not regularly use another business' critical vehicles, equipment, machinery, or facilities to provide a product or service to that same business or to a business in a substantially related field of work that would typically be considered an industry competitor;

(4) whether the business enterprise is self-performing work contracts they have engaged or whether that work is being subcontracted out to others; and

(5) whether present or recent working relationships between the owner(s) relied upon for certification and other business enterprises, including individuals employed thereat, compromise the independence of the applicant business enterprise.

(f) Other certification criteria. Applications to certify business enterprises as minority and/or women-owned business enterprises must satisfy the following additional criteria:

(1) Personal net worth. Minority group members and/or women relied upon for certification must demonstrate an individual personal net worth at the time of application that does not exceed fifteen million dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year starting in 2020; or such other amount that the director shall determine on an industry-by-industry basis, based on, for example and without limitation, factual findings by the division concerning the individuals within the industries under consideration. Regulations relating to the classification of any industry-by-industry personal net worth thresholds above the fifteen-million dollar threshold shall, to the extent practicable, be implemented within six months of the completion of the division's review needed to establish such thresholds, by the director.

(2) Small business requirement. Any business enterprise for which certification as a minority and/or women-owned business enterprise is sought must be a small business, as that term is defined in Part 140 of this Title.

(3) Authorization to do business. Any business enterprise for which certification as a minority and/or women-owned business enterprise is sought must be authorized to do business, and demonstrate that it actively conducts business, in the State of New York.

(4) Additional Requirements. The following requirements apply to all applicants seeking minority and/or women-owned business enterprise status and inclusion in the D[d]irectory[or certified businesses]:

(i) documentation may be required to substantiate the claim of membership in a minority group. This documentation may include, but is not limited to: birth certificates; naturalization papers, registration on Indian tribal rolls of federally recognized tribes by the United States Department of the Interior or of tribes set forth in Section 2 of the Indian Law, and nonresident visas;

(ii) sharing of tax and employer information;

(a)[1.] each business applying for minority and/or women-owned business enterprise certification pursuant to this section[Section 144.2 of Part 144 of this Title] must agree to allow:

(1)[A.] the [department of taxation and finance]Department of Taxation and Finance to share its tax information with the division;
and

(2)[B.] the [department of labor] Department of Labor to share its tax and employer information with the division.[:]

(b)[2.] such information provided pursuant to [paragraph]subparagraph (ii) of this [section]paragraph shall be kept confidential by the division as such information is kept by the [department of taxation and finance]Department of Taxation and Finance or the [department of

labor]Department of Labor and use of such information shall be limited to the certification application process, or other uses approved by the business enterprise or applicant.

Section 144.3. Selection and Assignment of Industry and Commodity Codes.

(a) Pursuant to section 311 of the New York Executive Law, the director shall prepare and update a Directory, which shall be divided into categories of labor, services, supplies, equipment, materials and recognized construction trades.

(b) In order to maintain an accurate and up-to-date Directory, the division shall have the authority to:

(1) Assign industry and/or commodity codes (herein, "Codes") to each certified minority and/or woman-owned business enterprise upon certification (herein, the "Code Assignment"), which will be displayed on the certified business enterprises' Directory profile.

(2) Review and adjust a business enterprise's previously determined Code Assignment. This may include adding Codes to and/or removing Codes from a certified business enterprise's Directory profile.

(i) Where the division adjusts a Code Assignment, it shall provide the certified business enterprise with sufficient notice and opportunity to challenge the proposed adjustment through the administrative process prescribed by the director.

(c) Code Assignments may include the North American Industry Classification System ("NAICS") codes, National Institute of Governmental Purchasing ("NIGP") codes, and/or Construction Specification Institute ("CSI") codes (herein, the "Coding Systems").

(1) The division adopts the Code definitions and/or descriptions provided by each of the Coding Systems in determining Code Assignments.

(2) If there is no Code within the Coding Systems that wholly describes the scope(s) of work the certified business enterprise performs, the division will assign the most appropriate Code and supplement or limit the Code Assignment with a concise narrative description in the certified business enterprise's Directory profile, describing the specific scope(s) of work performed by the certified business enterprise.

(3) NIGP codes will be assigned to certified business enterprises that sell or resell a specific commodity.

(d) To be assigned a certain Code, the certified business enterprise must demonstrate to the division that:

(1) The certified business enterprise self-performs the scope(s) of work described by the Code, as required by section 144.2(e) of this Part. The division will not assign Codes for products or services not directly provided by the certified business enterprise or for work subcontracted to other businesses and/or independent specialty trade contractors.

(2) The owner relied upon possesses industry-specific competence and is involved in the day-to-day operations, as required by sections 144.2(c)(1) and 144.2(c)(2) of this Part, with respect to the scope(s) of work described by the Code. The division will not assign Codes for products or services provided by employees at the certified business enterprise that are not relied upon for certification.

(e) The division has the complete and final authority to determine a certified business enterprise's Code Assignment during the certification and/or recertification application process. If a certified business enterprise would like to request an adjustment to their Code Assignment, it may submit a profile update application. The division has the complete and final authority to grant or reject any code(s) requested in a profile update application.

(f) The credit for utilization of a certified business enterprise on State contracts shall be limited to the scope(s) of work performed which align with the business enterprise's Code Assignment in accordance with section 142.7 of this Title.

Section 144.4[3]. Submission of an application.

(a) Timing and procedure for submission of an application. Applications to certify business enterprises as minority and/or women-owned business enterprises shall be submitted at such time and in such manner as prescribed in this subdivision.

(1) Time of submission. Applications to certify a business enterprise as a minority and/or women-owned business enterprise may be submitted after such business enterprise has been engaged in business activities for at least one (1) year. Where an application is submitted on behalf of a business enterprise that has not been in business selling goods or providing services for at least one (1) year under the ownership structure currently seeking certification, the division may, at its discretion, reject such application as described in this Part.

(2) Manner of submission. Applications shall be submitted electronically, in such form as the director shall require. An applicant may request to submit an application in paper form.

(i) Requests to submit a paper application shall be made to the director at the following address:

655[633] Third Avenue, 5th[33rd] Floor
New York, NY 10017

(ii) Requests to submit a paper application must contain the name of the business enterprise for which the paper application is requested, and the business address of such business enterprise.

(iii) Upon receipt of a request to submit a paper application, the division shall generate a paper application bearing the name of the business enterprise for which the paper application is requested and return the paper application to the business address provided in the request for a paper application.

(b) Processing of an application by the division. The division shall review applications to certify business enterprises as minority and/or women-owned business enterprises based upon the certification criteria described herein in accordance with the procedures of this subdivision.

(1) Initial review of applications. The division shall notify an applicant of the status of an application within twenty-one (21) days of receipt of such application. Such notification shall identify deficiencies in the application, if any.

(i) Notification that additional information is needed. Upon receipt of an incomplete application, the division shall, as part of its notification as to the status of the application, identify documents or information the division requires to deem the application complete. Such notification shall indicate that an applicant must provide any identified documents or information to the division within twenty (20) days of the date of the notification. If an applicant does not provide the requested documents or information within twenty (20) days of the date of notification, the division may reject the application.

(ii) Receipt of response to notification that additional information is needed. Upon receipt of a response to a notification that additional information is needed, the division shall, within twenty-one (21) days, notify an applicant that the application is complete or determine that additional documents or information are needed to deem the application complete. If the division determines that additional documents or information are required to deem the application complete, the division shall send a second notification that additional information is needed. Such notification shall indicate that an applicant must provide any identified documents or information to the division within twenty (20) days of the date of the notification. If an applicant does not provide the requested documents or information within twenty (20) days of the date of notification, the division may reject the application.

(iii) Receipt of response to second notification that additional information is needed. Upon receipt of a response to a second notification that additional information is needed, the division shall, within twenty-one (21) days, notify an applicant that the application is complete or determine that additional documents or information are needed to deem the application complete. If the division determines that additional documents or information are required to deem the application complete, the division shall send a third notification that additional information is needed. Such notification shall indicate that an applicant must provide any identified documents or information to the division within twenty

(20) days of the date of the notification. If an applicant does not provide the requested documents or information within twenty (20) days of the date of notification, the division may reject the application.

(iv) Receipt of response to third notification that additional information is needed. Upon receipt of a response to a third notification that additional information is needed, the division shall, within twenty-one (21) days, notify an applicant that the application is complete or, upon determining that the application remains incomplete, reject the application.

(2) Site visit or telephone interview. The division may, at its discretion, require minority group members and/or women relied upon to certify business enterprises as minority and/or women-owned business enterprises to be subject to a site visit or a telephone interview. Refusal by minority group members and/or women to participate in a site visit or telephone interview, or failure to appear at a scheduled site visit or telephone interview, may result in the rejection of any application by such minority group members and/or women.

(3) Curative Measures. A business enterprise may enter into legitimate transactions, alter the terms of ownership, make additional investments or bolster underlying documentation in a good faith effort to remove, surmount or correct defects in eligibility, in accordance with section 144.2 of this Part as long as the actions are consistent with the following:

(i) The division may notify the business of eligibility concerns and give the business time if the firm wishes to attempt to remedy impediments to certification.

(ii) The business may, of its own volition, take curative action up to the time of the division's decision. However, it must present evidence of curation before the division's decision.

(iii) The division may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.

(iv) While the division may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decisions based on available evidence.

(4) Complete application. Upon receipt of a complete application, the division shall make a determination to approve or deny such application within forty-five (45) days of receipt thereof.

(c) Rejection of an application. An applicant whose application has been rejected may not reapply for certification of a business enterprise as a minority and/or women-owned business enterprise for ninety (90) days. The division shall notify an applicant of its determination to reject an application in writing. Such notification shall identify the reason for its rejection of

the application, and state that the applicant may not reapply for ninety (90) days from the date of the notification of rejection.

(d) Approval of an application. Upon the determination by the division to approve an application, the division shall send the applicant written notice of its determination. Such notification shall: indicate whether the business enterprise has been certified as a minority-owned business enterprise, a women-owned business enterprise, or both; state that the business enterprise shall be certified for a period of five (5) years commencing upon the date of approval of the application; state that the business enterprise shall be listed in the Directory; and require that the division be informed of any material change to the circumstances of the application, including, but not limited to, the ownership of the business enterprise and the primary place of business of the business enterprise, within thirty (30) days of such change.

(e) Denial of an application. Upon the determination by the division to deny an application, the division shall send the applicant written notice of its determination. Such notification shall identify the certification criteria that form the basis of the denial and describe the procedures by which an applicant may appeal a denial determination as set forth in Part 145 of this Title.

(1) Failure to appeal a denial determination. In the event that an applicant fails to submit a timely request for an appeal, as described in Section 145.2 of Part 145 of this Title, the denial determination shall be final. An applicant whose application has been finally denied may not reapply for two (2) years from the date of receipt of the written notice of denial without the approval of the director.

(2) In the event that an applicant appeals such denial determination, and such denial determination is upheld following a complete exhaustion of all appeals, the applicant may not reapply for certification for two (2) years from the date of a final determination and/or judicial order, whichever is later.

Section 144.5[4]. Revocation of certification as a minority and/or women-owned business enterprise.

(a) [The director shall revoke the minority or woman-owned business enterprise status of a certified business for a period of two years, if it is demonstrated that minority group members or women no longer own and control the business enterprise in accordance with rules set forth in section 144.2 of this Part.] A certified business enterprise must notify the division within thirty (30) days of any material change in the information contained in the original application. A material change is any development that would materially affect eligibility, based on all certification criteria, including but not limited to: a change in ethnicity, sex, percentage of ownership in the business enterprise, address, officers or services provided by the certified business.

(b) [A certified business enterprise must notify the division within thirty (30) days of any material change in the information contained in the original application. A material change is any development that would materially affect eligibility, based on all certification criteria, including but not limited to: a change in ethnicity, sex, percentage of ownership in the business enterprise, address, officers or services provided by the certified business. If a material change is indicated,

a review may be conducted by the division.]The director shall revoke the minority and/or woman-owned business enterprise status of a certified business, if it is demonstrated that:

(1) there has been a material change and the minority group members and/or women relied upon for certification no longer own, operate and/or control the business enterprise in accordance with rules set forth in section 144.2 of this Part; and/or

(2) the certified business enterprise can no longer perform a commercially useful function, and/or, did not perform a commercially useful function on a contract or project submitted in support of the certified business enterprise's certification application.

(c) Review of continued eligibility. The director may, upon becoming aware of facts suggesting the circumstances described in subdivision (b) of this section[a certified minority or women-owned business enterprise no longer meets the certification criteria of this Part or cannot perform a commercially useful function], initiate a review of a certified minority and/or women-owned business enterprise during the course of its certification according to the procedures of this subdivision.

(1) Notification of review. Upon determining to conduct a review of the continued eligibility of a business enterprise to be certified as a minority and/or women-owned business enterprise, the director shall notify such certified minority and/or women-owned business enterprise in writing of his or her intent to conduct a review.

(i) Contents of notification of review. The notification of review shall specify the grounds of the review, including the certification criteria that the director has become aware that the certified minority and/or women-owned business enterprise may no longer satisfy[,] and/or the name of the contract or project on which the certified minority and/or women-owned business enterprise did not perform a commercially useful function, and request information or documents related to the grounds for[the] review.

(ii) The director may, at his or her discretion, request that minority group members and/or women owners relied upon for certification of the minority and/or women-owned business enterprise under review participate in a phone interview or be subject to a site visit.

(2) After completing his or her review of the continued eligibility of a certified minority and/or women-owned business enterprise, the director shall notify such business enterprise of the results of the review in writing; within thirty (30) days of completion of such review.

(d) Notification of intent to revoke certification. In the event that the director determines that a business enterprise is no longer eligible to be certified as a minority and/or women-owned business enterprise, after conducting a review of such business enterprise, the director shall notify such business enterprise via personal service or certified mail, return receipt requested, of his or her intent to revoke its certification as a minority and/or women-owned business enterprise.

(1) Contents of notice of intent to revoke certification. The notification of intent to revoke certification shall identify the grounds for [certification criteria that form the basis of the]revocation as described in subdivision (b) of this section, including any evidence demonstrating such grounds, if applicable, and describe the procedures by which the intent to revoke[revocation] may be appealed pursuant to Part 145 of this Title.

(e) Notice of revocation of certification. In the event that a business enterprise fails to timely appeal a notification of intent to revoke certification or following an appeal pursuant to [Section]section 145.2 [of Part 145] of this Title, the director may issue a notice of revocation of certification and remove such business enterprise from the Directory. Such notice shall indicate that the certification of the business enterprise as a minority and/or women-owned business enterprise is revoked as of the date of the notice, that the business enterprise has been removed from the Directory as of the date of the notice, and that the business enterprise may not reapply for certification as a minority and/or women-owned business enterprise for two (2) years from the date of the notice of revocation of certification, except as otherwise provided in this section.

(f) Revocation for [convictions of]fraud. The director, upon becoming aware of a final judgment of conviction by any court of competent jurisdiction, for fraud by any person of a New York State certified minority and/or women-owned business enterprise, as it relates to the business enterprise's certification criteria of this Part:[, or] of a conviction for fraudulently misrepresenting the status of the business enterprise;[,] or after a determination of fraudulent or misleading activity following a review as described in subdivision (c) of this section, shall revoke such business enterprise's certification in accordance with the procedures of this subdivision.

(1) Where a person has been convicted of fraud as a misdemeanor, or has been revoked for a determination of fraudulent or misleading activity following a review as described in subdivision (c) of this section, that person may not reapply for certification as a minority and/or women-owned business enterprise for two (2) years from the date of revocation.

(2) Where a person has been convicted of fraud as a felony, or has been revoked for a determination of fraudulent or misleading activity following a review as described in subdivision (c) of this section a second time within ten (10) years of the first finding, that person may not reapply for certification as a minority and/or women-owned business enterprise for up to five (5) years from the date of revocation.

(3) Where a person has been convicted two times for fraud as a felony, within ten years of the first conviction, or has been revoked for a determination of fraudulent or misleading activity following a review as described in subdivision (c) of this section, that person shall be banned from applying for certification as a minority and/or women-owned business for life.

(g) [The]Any final decision of the director to revoke a certified business enterprise shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.

(h) During the pendency of a challenge, a presumption of eligibility shall remain in effect for the challenged certified minority and/or women-owned business enterprise.

Section 144.6[5]. Criteria for acceptance of [federal]Federal certification in lieu of completing and submitting the New York State minority and [women]woman-owned business enterprise certification application.

(a) The division may approve an applicant as a certified business without requiring that applicant to complete the New York State minority and woman-owned business enterprise certification application provided:

- (1) the applicant demonstrates that it holds a current [federal]Federal certification [pursuant to Title 49 CFR Part 26 or Title 13 CFR Part 124]by submitting a true copy of the certification to the division;
- (2) the applicant completes the supplemental application;
- (3) the applicant provides a signed authorization for the exchange of information between the division and the certifying entity for the purpose of determining the applicant's eligibility for certification;
- (4) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the [federal]Federal certification is accurate to the best of that person's knowledge; and
- (5) the applicant provides proof satisfactory to the division that the applicant is owned, operated and controlled by women and/or minority group members and that the individual or individuals whose ownership, control and operation are relied upon for certification, meet the requirements of personal net worth and the definition of small business set forth in these regulations. Documentation referenced in section 144.2(f)(4)(i) of this Part may be required to substantiate the claim of membership in a minority group or gender.

(b) Notwithstanding anything to the contrary in subdivision (a) of this section [144.5(a) above], the division reserves the right to:

- (1) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part; and
- (2) reject or deny certification if the division is not satisfied that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part.

(c) After verification by the division that an applicant has satisfied all of the criteria in subdivisions (a) and (b) of this section [144.5(a), and 144.5(b)] if applicable, such applicant

shall become certified as a minority and/or women-owned business enterprise without completing the New York State minority and woman-owned business enterprise certification application.

(d) The process described in sections 144.[3]4 and 144.[4]5 of this Part and sections 145.1 and 145.2 of this Title [of Part 145] will apply to [S]supplemental [A]applications.

Section 144.7[6]. Criteria for acceptance of New York municipal certification in lieu of completing and submitting the New York State minority and [women]woman-owned business enterprise certification application.

(a) The division may approve an applicant as a certified business without requiring that applicant to complete the New York State minority and woman-owned business enterprise certification application provided:

- (1) the applicant demonstrates that it holds a current New York municipal certification with an active municipal certification program by submitting a true copy of the certification to the division;
- (2) the applicant completes the supplemental application;
- (3) the applicant provides a signed authorization for the exchange of information between the division and the municipal certifying entity for the purpose of determining the applicant's eligibility for certification;
- (4) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the New York municipal certification is accurate to the best of that person's knowledge; and
- (5) the applicant provides proof satisfactory to the division that the applicant is owned, operated and controlled by women and/or minority group members and that the individual or individuals whose ownership, control and operation are relied upon for certification, meet the requirements of personal net worth and the definition of small business set forth in this regulation. Documentation such as that referenced in section 144.2(f)(4)(i) of this Part may be required to substantiate the claim of membership in a minority group or gender.

(b) Notwithstanding anything to the contrary in subdivision (a) of this section [144.6(a) above], the division reserves the right to:

- (1) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part; and

(2) reject or deny certification if the division is not satisfied that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part.

(c) After verification by the division that an applicant has satisfied all of the criteria in subdivisions (a) and (b) of this section [144.6(a), and 144.6(b)] if applicable, such applicant shall become certified as a minority and/or women-owned business enterprise without completing the New York State minority and woman-owned business enterprise certification application.

(d) The process described in sections 144.~~3~~4 and 144.~~4~~5 of this Part and sections 145.1 and 145.2 of this Title [Part 145] will apply to the supplemental application.

Section 144.~~8~~7. Criteria for acceptance of DD Form 214 by the United States department of defense in lieu of other documents as proof of race or ethnicity and certain personal information of an applicant for purposes of certification of the applicant's business as a minority-owned business.

(a) Any applicant applying for certification as a minority-owned business, who was a military service member, and upon such applicant's retirement, separation, or discharge from active duty in the armed forces of the United States, and who has been provided the DD Form 214, may submit such form to prove his or her race or ethnicity, date of birth, place of birth, and verification of address for purposes of certification, in lieu of requiring the applicant to otherwise prove his or her race or ethnicity, provided the DD Form 214 contains such information.

Section 144.9. Professional Declaration of Eligibility Application

(a) The Professional Declaration of Eligibility (PDE) application is an expedited certification process that authorizes licensed attorneys, certified public accountants (CPAs), NYS Licensed Architects, NYS License Engineers and NYS Licensed Land Surveyors to attest that an applicant meets the requirements of the applicable certification program and that the application package does not contain any false information. Only professionals licensed by the State of New York for at least five years are eligible to submit PDE applications.

(b) The following business enterprises are not eligible to apply for certification through the PDE:

(1) business enterprises seeking certification in construction;

(2) business enterprises seeking certification as a supplier or broker, as defined and distinguished by the division;

(3) any business enterprise that has received a rejection of an application from the division in the last year; and

(4) any business enterprise that has been denied certification by the division in the previous two years.

(c) For each application, the professional is required to submit a signed and dated PDE statement in which it is required to attest, among other things, that the professional is eligible to participate in the PDE program, the professional understands the division's certification rules and regulations; and that the applicant is eligible for certification based on the division's certification rules and regulations. The professional may be required to submit additional attestations in the PDE statement as required by the division.

(d) PDE applications must not be submitted unless the applicant meets all requirements for certification and all necessary documentation demonstrating the applicant's eligibility is provided to the division. If a PDE application is incomplete or additional information is needed, the division will review the application through the standard certification process. All PDE applications are subject to audit by the division to determine whether the business enterprise is in compliance with the requirements for certification.

(e) In the event the division discovers errors or false statements in a PDE application, whether willful or non-willful, the application will be rejected and the business enterprise will be precluded from utilizing that application in the future.

PART 145. APPEALS

Section 145.1. Purpose and general description.

(a) This Part implements Section 314(3) and Section 316 of the Executive Law. Section 314(3) of the Executive Law requires the director to provide for an administrative hearing in the event that a business enterprise is denied certification as a minority and/or women-owned business enterprise and in cases where the director intends to revoke the certification of a minority and/or women-owned business enterprise or in cases concerning contractor/agency complaints.

Section 145.2. Appeal procedures concerning denials to certify a business enterprise as a minority and/or women-owned business enterprise or notification of intent to revoke certification.

(a) Initiation of an appeal. Upon denial of an application to certify a business enterprise as a minority and/or women-owned business enterprise, pursuant to [Section]section 144.[3]4(e) [of Part 144] of this Title, or the issuance of a notification of intent to revoke certification as a minority[-or] and women-owned business enterprise pursuant to [Section]section 144.[4]5((b)d) [of Part 144] of this Title, such business enterprise may request an appeal pursuant to the provisions of this subdivision.

(1) Request for an appeal. Upon receipt of a notice of determination to deny an application to certify a business enterprise as a minority and/or women-owned business enterprise, pursuant to [Section]section 144.[3]4(e) or 144.[4]5((b)d) [of Part 144] of this

Title, such business enterprise may submit a request for an appeal to be presided over by an independent hearing officer.

(i) Deadline for request for an appeal. A request for an appeal shall be made within thirty (30) days from the date of ~~the~~[receipt of a] notice of determination to deny an application or notification of intent to revoke certification. Failure by a business enterprise to request an appeal within thirty (30) days of the date of a notice of determination to deny an application or notification of intent to revoke certification shall constitute a forfeiture by such business enterprise of its right to request an appeal. In the case of an applicant's failure to timely appeal a determination to deny an application, such business enterprise will be barred from reapplying for certification for a period of two (2) years, or in such instance where a business enterprise was denied recertification, such business enterprise will also be removed from the Directory. In the case of failure to timely appeal a notice of intent to revoke certification, the director shall issue a notice of revocation and remove the business enterprise from the Directory.

(ii) Contents of a request for an appeal. A request for an appeal shall be made in writing and shall identify whether the business enterprise elects either to be heard at an in-person hearing before an independent hearing officer or to submit a written appeal submission to an independent hearing officer. Once the request for appeal has been submitted, the business enterprise may not change its election.

(2) Notice of hearing or written appeal. Upon receipt of a timely request for an appeal, the division shall appoint an independent hearing officer and provide the business enterprise requesting the appeal with a notice of hearing or a notice of written appeal.

(i) Appointment of the independent hearing officer. The director shall appoint any impartial person to serve as an independent hearing officer. If, at any time, the director learns that an individual appointed to serve as an independent hearing officer would experience a conflict of interest in serving as an independent hearing officer, or that such individual's service as an independent hearing officer would give rise to an appearance of impropriety, the director shall remove the independent hearing officer and appoint a replacement independent hearing officer.

(ii) Contents of notice of hearing. A notice of hearing shall be in writing, and shall contain the following information:

[1.](a) The time and location of the hearing;

[2.](b) The identity of the hearing officer who shall preside over the hearing, to the extent known;

[3.](c) The legal authority for the hearing;

[4.](d) The certification or revocation criteria at issue;

[5.](e) The identity of the individual who shall represent the division in the hearing, to the extent known;

[6.](f) A statement that interpreter services shall be made available to deaf persons; and

[7.](g) The procedure to request an adjournment of the hearing.

(iii) Contents of notice of written appeal. A notice of written appeal shall be in writing, and shall contain the following information:

[1.](a) The deadline by which the business enterprise must submit its complete written appeal, and any exhibits thereto is sixty (60) days from the date of the notice to proceed via written appeal[its receipt of written notice of determination to deny its application for certification or notification of intent to revoke certification];

[2.](b) [The]the identity of the hearing officer who shall adjudicate the written appeal, to the extent known;

[3.](c) [The]the legal authority for the conduct of the written appeal;

[4.](d) [The]the certification or revocation criteria at issue;

[5.](e) [The]the identity of the individual who shall submit a response to the written appeal of the business enterprise on behalf of the division, to the extent known; and

[6.](f) [The]the procedure to request an extension for the submission of a written appeal.

(3) Request for an adjournment of a hearing or extension for submission of a written appeal. A business enterprise may request an adjournment of a hearing, or an extension to submit a written appeal, pursuant to the provisions of this paragraph.

(i) Request for an adjournment of a hearing. A request for an adjournment of a hearing must be made to the independent hearing officer identified in the notice of hearing at least seven (7) business days prior to the scheduled date of the hearing and must state the reason for the request. Upon a showing of good cause, the independent hearing officer may, at his or her discretion, grant a timely request for an adjournment of a hearing.

(ii) Request for an extension for the submission of a written appeal. A request for an extension for the submission of a written appeal must be made to the independent hearing officer identified in the notice of written appeal at least seven (7) business days prior to the date by which the business enterprise must

submit its complete written appeal and must state the reason for the request. Upon a showing of good cause, the independent hearing officer may, at his or her discretion, grant a timely request for an extension to submit a written appeal.

(4) Requests to withdraw an appeal. The hearing officer will consider a request for an appeal to be withdrawn under the following circumstances:

(i) The hearing officer has received a written or verbal statement from the petitioner, or the petitioner's attorney; stating that the request for a hearing or request to proceed via written appeal be withdrawn.

(b) Conduct of the appeal. The independent hearing officer shall, subject to the provisions of this paragraph, conduct the appeal in such order and manner as he or she deems appropriate. In the case of an appeal of a determination to deny certification, the burden of proof shall rest with the applicant.

(1) Conduct of a hearing. All parties shall be given the opportunity to present evidence and oral argument, provided, however, the evidence presented shall be limited to such relevant documentation that, in the case of denial, was before the division at the time of the denial determination, and in the case of intent to revoke, was before the division at the time of notification of intent to revoke; and the independent hearing officer may exclude irrelevant or unduly repetitious evidence from the appeal record.

(i) Recording of the proceedings. The division shall record the proceedings via an electronic recording device.

(ii) Entering testimony into the appeal record. All testimony received into the appeal record shall be under oath or affirmation.

(iii) Rules of technical evidence and procedure. The independent hearing officer shall not be bound by the technical rules of evidence and procedure.

(iv) Representation. All parties may appear at the hearing with legal counsel.

(v) Witnesses. All parties shall have the right to call witnesses and to examine and cross-examine other parties and their witnesses.

(2) Conduct of a written appeal. All parties shall be accorded full opportunity to present evidence and written arguments, provided, however, that the independent hearing officer may exclude irrelevant or unduly repetitious evidence from the appeal record. Relevant evidence shall be limited to the documents and information that was before the division at the time of denial or time of notification of intent to revoke.

(3) Requests for limited discovery. Limited document discovery shall be permitted to a petitioner in any proceeding before a hearing officer. Depositions, interrogatories and other disclosure devices are not permitted.

(i) The documents to be discovered shall be limited to those which, as of the date of the discovery request, the division has in its possession and which were before the division at the time of denial or at the time of intent to revoke.

(ii) A request for limited discovery of documents shall be made in writing to the individual representing the division in the proceeding, as set forth in the notice of hearing or notice of written appeal, with a copy sent to the hearing officer designated to conduct the appeal, at least twenty-one (21) days prior to the date of the hearing or the date by which the written appeal must be submitted.

(iii) The request shall set forth the specific documents being requested.

(iv) Requested documents which are properly discoverable shall be provided to the requesting party, if applicable, within twenty-one (21) days after the receipt of the written request, unless due to the volume of documents being requested, the copying of such documents cannot reasonably be completed within such period.

(v) Where the documents cannot be provided within twenty-one (21) days, written notice of such shall be given to the requesting party, with a copy to be sent to the hearing officer designated to conduct the appeal. Such notice shall state when the requested documents are expected to be provided and the reason(s) for the time to produce.

(4) Closing of the appeal record. The independent hearing officer shall close the appeal record at his or her discretion and may request additional information of the parties based upon the proceedings of a hearing or written appeal. Such additional information shall be limited to information that was before the division at the time of denial or at the time of intent to revoke.

(5) Standard of review. In the case of an appeal pursuant to [Section]section 144.[3]4(e) [of Part 144] of this Title, the independent hearing officer shall, based upon the information contained in the appeal record, determine whether the division's determination to deny an application by a business enterprise to be certified as a minority and/or women-owned business enterprise was supported by substantial evidence. In the case of an appeal pursuant to [Section]section 144.[4]5([b]d) [of Part 144] of this Title, the independent hearing officer shall, based upon the information contained in the appeal record, determine whether the division's intent to revoke the certification of a business enterprise as a minority and/or women-owned business enterprise is supported by the preponderance of the evidence.

(6) Findings of the independent hearing officer. The independent hearing officer shall render a recommended order and serve a copy of such recommended order to the parties by personal service, electronic mail, or certified mail, return receipt requested, within sixty (60) days of the date upon which the appeal record was closed.

(7) Final Order. The director shall, within thirty (30) days of receipt of a recommended order from an independent hearing officer, render a final order. Such final

order may accept, reject, or modify the findings of the independent hearing officer, and must also provide the reasoning for such final determination. The director shall provide a copy of the final order to the business enterprise that is the subject of the final order via personal service, electronic mail, or certified mail, return receipt requested.

- (c) In the absence, disability, or disqualification of a hearing officer or for other good cause, a hearing may be transferred to another hearing officer.

Section 145.3. Appeal procedures concerning contractor and State agency complaints

(a) Initiation of an appeal. If within thirty (30) days of receipt of a complaint made pursuant to section 142.13[12](a), 142.13[12](b), or 143.6, of this Title the director is unable to resolve the complaint to the satisfaction of the State agency and the contractor, the complaint shall be referred to the division's hearing officer for a hearing, conducted in accordance with the procedures set forth in this section.

(b) Notice of hearing or written appeal. The division shall appoint an independent hearing officer to preside over the appeal and provide written notice of hearing or of written appeal to the parties. The notice shall include, but not be limited to, the following information:

- (1) a statement of the legal authority and jurisdiction pursuant to which the appeal is being held;
- (2) where possible, a reference to the specific sections of the statute, regulations and/or standards involved;
- (3) a statement of the matters raised and the issue(s) to be determined, provided, however, that nothing shall preclude the consideration at the hearing of relevant issues not raised in the notice, in a manner consistent with the complainant's right to respond to such issues;
- (4) the identity of the hearing officer designated to conduct the hearing, to the extent known;
- (5) the identity of the individual representing the State agency in the proceeding to the extent known;
- (6) the procedure to apply for an adjournment or withdrawal of the complainant's request for a hearing or written appeal; and
- (7) in the case of a hearing, the time and location of the hearing or in the case of a written appeal, the date by which the written appeal and exhibits thereto must be submitted as well as the date by which any response is due.

(c) Request for an adjournment of a hearing. A request for an adjournment of a hearing or written appeal submission must be made to the independent hearing officer identified in the notice of hearing at least seven (7) business days prior to the scheduled date of the hearing and must state the reason for the request. The independent hearing officer may, at his or her

discretion, grant a timely request for an adjournment of a hearing or submission of written appeal.

(d) Request to withdraw an appeal. The hearing officer will consider a request for an appeal to be withdrawn under the following circumstances: the hearing officer has received a written or verbal statement from a party requesting the hearing or written appeal be withdrawn.

(e) Appointment of the independent hearing officer. The director shall appoint any impartial person to serve as an independent hearing officer. If, at any time, the director learns that an individual appointed to serve as an independent hearing officer would experience a conflict of interest in serving as an independent hearing officer, or that such individual's service as an independent hearing officer would give rise to an appearance of impropriety, the director shall remove the independent hearing officer and appoint a replacement independent hearing officer.

(f) Limited discovery shall be permitted to the complainant. Depositions, interrogatories and other disclosure devices are not permitted.

(1) The documents to be discovered shall be limited to those which, as of the date of the discovery request, the State agency has in its possession and which were before the director at the time of the complaint.

(2) A request for limited discovery of documents shall be made in writing to the individual representing the State agency in the proceeding, as set forth in the notice of hearing, with a copy sent to the hearing officer designated to conduct the hearing, at least twenty-one (21) prior to the date of the hearing or date by which the written appeal submission is due.

(3) The request shall set forth the specific documents being requested.

(4) Requested documents which are properly discoverable shall be provided to the requesting party, if applicable, within twenty-one (21) days after the receipt of the written request, unless due to the volume of documents being requested, the copying of such documents cannot reasonably be completed within such period.

(5) Where the documents cannot be provided within twenty-one (21) days, written notice of such shall be given to the requesting party, with a copy to be sent to the hearing officer designated to conduct the appeal. Such notice shall state when the requested documents are expected to be provided and the reason(s) for the time to produce.

(g) Conduct of the appeal. The independent hearing officer shall, subject to the provisions of this paragraph, conduct the appeal in such order and manner as he or she deems appropriate.

(1) Conduct of a hearing. All parties shall be given the opportunity to present evidence and oral argument, provided, however, the evidence presented shall be limited to such relevant documentation that before the director at the time of the complaint and the independent hearing officer may exclude irrelevant or unduly repetitious evidence from the appeal record.

(i) Recording of the proceedings. The division shall record the proceedings via an electronic recording device.

(ii) Entering testimony into the appeal record. All testimony received into the appeal record shall be under oath or affirmation.

(iii) Rules of technical evidence and procedure. The independent hearing officer shall not be bound by the technical rules of evidence and procedure.

(iv) Representation. All parties may appear at the hearing with legal counsel.

(v) Witnesses. All parties shall have the right to call witnesses and to examine and cross-examine other parties and their witnesses.

(2) Conduct of a written appeal. All parties shall be accorded full opportunity to present evidence and written arguments, provided, however, that the independent hearing officer may exclude irrelevant or unduly repetitious evidence from the appeal record. Relevant evidence shall be limited to the documents and information that was before the director at the time of the complaint.

(h) Closing of the appeal record. The independent hearing officer shall close the appeal record at his or her discretion and may request additional information of the parties based upon the proceedings of a hearing. Such additional information shall be limited to information that was before the director during dispute resolution under section 142.13[12](d) or 143.6(c) of this Title.

(i) Resolution of complaints under section 142.13[12] of this Title. Upon conclusion of the administrative hearing or written appeal, the procedures set forth in section 142.13[12](e) – (g) of this Title [Part 142] shall apply.

(j) Resolution of complaints made under section 143.6 of this Title. Upon conclusion of the administrative hearing or written appeal, the procedures set forth in section 143.6(e) – (g) of this Title [Part 143] shall apply.

PART 146. ANNUAL REPORT OF THE DIVISION

Section 146.1. Purpose and general description.

(a) This Part implements [Section]section 315(4) of the Executive Law. [Section]section 315(4) requires the division to prepare an annual report on the activities of the division, and on developments in the effort to promote the utilization of minority and women-owned business enterprises in State contracting activity.

Section 146.2. The division's annual report.

(a) The division shall submit an annual report to the Chief Diversity Officer on or before November 1st of each year which:

- (1) summarizes the report submitted by each contracting agency pursuant to [Section]section 141.6 [of Part 141] of this Title;
 - (2) contains such comparative or other information as the director deems appropriate, including, but not limited to, goals compared to actual participation of certified minority and women-owned business enterprises in State contracting, to evaluate the effectiveness of the activities undertaken by each such contracting agency to promote increased participation by certified minority and women-owned business enterprises with respect to State contracts and subcontracts;
 - (3) contains a summary of all waivers granted by each contracting agency pursuant to [Section]section 142.[7]§ [of Part 142] of this Title during the period covered by the report, including a description of the basis of the waiver request and the contracting agency's rationale for granting any such waiver;
 - (4) contains a listing of annual participation rates for each agency, the total number of certified minority and women-owned businesses for that reporting year, and the total dollar value of State expenditures on certified minority and women-owned business contracts and subcontracts for that reporting year;
 - (5) describes any efforts to create a database or other information storage and retrieval system containing information relevant to contracting with certified minority and women-owned business enterprises; and
 - (6) contains a summary of:
 - (i) all determinations of violations of this article by a contractor or a contracting agency made during the period covered by the annual report; and
 - (ii) the penalties or sanctions, if any, assessed in connection with such determinations and the rationale for such penalties or sanctions.
 - (7) Contains information on which expenditures each agency deemed exempt from participation goals and the rationale for each such exemption;
- (b) Copies of the annual report shall be provided to the commissioner, the Governor, the Comptroller, the Temporary President of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate, the Minority Leader of the Assembly and shall also be made widely available to the public via, among other things, publication on a website maintained by the division.

PART 147. SEVERABILITY

- (a) If any clause, sentence, paragraph, section or part of these regulations shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence,

paragraph, section or part of this act directly involved in the controversy in which the judgment shall have been rendered.