

**NEW YORK STATE FINANCE AGENCY, STATE OF NEW YORK MORTGAGE AGENCY  
NEW YORK STATE AFFORDABLE HOUSING CORPORATION,  
STATE OF NEW YORK MUNICIPAL BOND BANK AGENCY, AND  
TOBACCO SETTLEMENT FINANCING CORPORATION  
641 LEXINGTON AVENUE, NEW YORK, NEW YORK 10022, (212) 688-4000**

**DIVISION OF HOUSING AND COMMUNITY RENEWAL  
HOUSING TRUST FUND CORPORATION  
38-40 STATE STREET, ALBANY, NEW YORK 12207**

**January 2018**

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**APPENDIX II**

**PARTICIPATION BY MINORITY GROUP MEMBERS AND WOMEN  
REQUIREMENTS AND PROCEDURES  
FOR CONTRACTS WITH**

**NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL  
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HOUSING TRUST FUND CORPORATION  
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**I. General Provisions**

- A. The New York State Division of Housing and Community Renewal, New York State Housing Finance Agency, Housing Trust Fund Corporation, New York State Affordable Housing Corporation, State of New York Mortgage Agency, State of New York Municipal Bond Bank Agency and Tobacco Settlement Financing Corporation (individually, “Agency” and collectively, “Agency(ies)” or “Agencies”) are required to implement the provisions of New York State Executive Law Article 15-A and Parts 140-145 of Title 5 of the New York Codes, Rules and Regulations (“NYCRR”) for all New York State (“State”) contracts, as defined therein, with a value (1) in excess of \$25,000 for labor, services, equipment, materials, or any combination of the foregoing or (2) in excess of \$100,000 for real property renovations and construction.
- B. The contractor to the subject contract (the “Contractor” and the “Contract,” respectively) agrees, in addition to any other nondiscrimination provision of the Contract and at no additional cost to the Agency(ies), to fully comply and cooperate with the Agency(ies) in the implementation of New York State Executive Law Article 15-A and the regulations promulgated thereunder. These requirements include equal employment opportunities for minority group members and women (“EEO”) and contracting opportunities for New York State-certified minority and women-owned business enterprises (“MWBES”). The Contractor’s demonstration of “good faith efforts” pursuant to 5 NYCRR § 142.8 shall be a part of these requirements. These provisions shall be deemed supplementary to, and not in lieu of, the nondiscrimination provisions required by New York State Executive Law Article 15 (the “Human Rights Law”) and other applicable federal, State, and local laws.
- C. Failure to comply with all of the requirements herein may result in a finding of non-responsiveness, non-responsibility and/or a breach of contract, leading to the assessment of liquidated damages pursuant to Section VII of this Appendix and such other remedies available to the Agency(ies) pursuant to the Contract and applicable law.

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**II. Contract Goals**

- A. For purposes of this Contract, the Agency's (or Agencies') overall MWBE participation goal for the Contract is indicated in the solicitation document and the Contract.
- B. For purposes of providing meaningful participation by MWBEs on the Contract and achieving the MWBE Contract Goals established in Section II-A of this Appendix, the Contractor should reference the directory of State certified MWBEs at the following internet address: <https://ny.newnycontracts.com>.

Additionally, the Contractor is encouraged to contact the Division of Minority and Women's Business Development at (212) 803-2414 to discuss additional methods of maximizing participation by MWBEs on the Contract.

- C. The Contractor understands that only sums paid to MWBEs for the performance of a commercially useful function, as that term is defined in 5 NYCRR § 140.1, may be applied towards the achievement of the applicable MWBE participation goal. [FOR CONSTRUCTION CONTRACTS – The portion of a contract with an MWBE, serving as a supplier that shall be deemed to represent the commercially useful function performed by the MWBE, shall be 60% of the total value of the contract. The portion of a contract with an MWBE, serving as a broker that shall be deemed to represent the commercially useful function performed by the MWBE, shall be the monetary value for fees, or the markup percentage, charged by the MWBE]. [FOR ALL OTHER CONTRACTS - The portion of a contract with an MWBE, serving as a broker that shall be deemed to represent the commercially useful function performed by the MWBE, shall be 25% of the total value of the contract].
- D. The Contractor must document “good faith efforts,” pursuant to 5 NYCRR § 142.8, to provide meaningful participation by MWBEs as subcontractors and suppliers in the performance of the Contract. Such documentation shall include, but not necessarily be limited to:
  - 1. Evidence of outreach to MWBEs;
  - 2. Any responses by MWBEs to the Contractor's outreach;
  - 3. Copies of advertisements for participation by MWBEs in appropriate general circulation, trade, and minority or women-oriented publications;
  - 4. The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the Agency(ies) with MWBEs; and

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5. Information describing specific steps undertaken by the Contractor to reasonably structure the Contract scope of work to maximize opportunities for MWBE participation.

**III. Equal Employment Opportunity (“EEO”)**

- A. The provisions of Article 15-A of the Executive Law and the rules and regulations promulgated thereunder pertaining to equal employment opportunities for minority group members and women shall apply to the Contract.
- B. In performing the Contract, the Contractor shall:
  1. Ensure that each contractor and subcontractor performing work on the Contract shall undertake or continue existing EEO 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, EEO 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. The Contractor shall submit an EEO policy statement to the Agency(ies) within seventy-two (72) hours after the date of the notice by the Agency(ies) to award the Contract to the Contractor.
  3. If the Contractor, or any of its subcontractors, does not have an existing EEO policy statement, the Agency(ies) may require the Contractor or subcontractor to adopt a model statement (see [PROC-4 Form – Equal Employment Opportunity Policy Statement](#), hyperlinked herein).
  4. The Contractor’s EEO policy statement shall include the following language:
    - a. The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color, national origin, sex, age, disability, or marital status, will undertake or continue existing EEO programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force.
    - b. The Contractor shall state in all solicitations or advertisements for employees that, in the performance of the 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.

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- c. 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 on the basis of race, creed, color, national origin, sex age, disability or marital status and that such union or representative will affirmatively cooperate in the implementation of the Contractor's obligations herein. *(Please note that this requirement is only applicable for a contract with an anticipated total expenditure in excess of \$250,000).*
- d. The Contractor will include the provisions of Subdivisions (a) through (c) of this Subsection 4 and Paragraph "E" of this Section III, which provides for relevant provisions of the Human Rights Law, in every subcontract in such a manner that the requirements of the subdivisions will be binding upon each subcontractor as to work in connection with the Contract.

C. [PROC-1 Form – EEO Staffing Plan](#)

To ensure compliance with this Section, the Contractor shall submit a [Staffing Plan PROC-1 form](#), hyperlinked herein, to document the composition of the proposed workforce to be utilized in the performance of the Contract by the specified categories listed, including ethnic background, gender, and Federal occupational categories. The Contractor shall complete the Staffing Plan PROC-1 form and submit it as part of their bid or proposal or within a reasonable time, as directed by Agency(ies).

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D. [PROC-5 Form – EEO Workforce Utilization Report](#)

1. The Contractor shall submit an [EEO Workforce Utilization Report PROC-5 form](#), hyperlinked herein, and shall require each of its subcontractors to submit a EEO Workforce Utilization Report PROC-5 form, on a quarterly basis during the term of the Contract, in accordance with the instructions indicated in the Contract and the [Instructions](#), hyperlinked herein. *(Please note that for Construction Contracts, the Contractor shall submit a Workforce Utilization Report, and shall require each of its subcontractors to submit a Workforce Utilization Report, on a monthly basis during the term of the Contract, in accordance with the instructions indicated in the Contract and the [Instructions](#), hyperlinked herein).*
  2. Separate forms shall be completed by the Contractor and any subcontractors.
  3. Pursuant to Executive Order #162, Contractors and subcontractors are also required to report the gross wages paid to each of their employees for the work performed by such employees on the Contract on a quarterly basis.
- E. The Contractor shall comply with the provisions of the Human Rights Law, and all other State and Federal statutory and constitutional non-discrimination provisions. The Contractor and its subcontractors shall not discriminate against any employee or applicant for employment because of race, creed (religion), color, sex, national origin, sexual orientation, military status, age, disability, predisposing genetic characteristic, marital status or domestic violence victim status, and shall also follow the requirements of the Human Rights Law with regard to non-discrimination on the basis of prior criminal conviction and prior arrest.

IV. [MWBE Utilization Plan, PROC-2 Form](#)

- A. The Contractor represents and warrants that the Contractor has submitted an [MWBE Utilization Plan, PROC-2 form](#), hyperlinked herein, or shall submit an MWBE Utilization Plan at such time as shall be required by the Agency(ies), provided, however, that the Contractor may arrange to provide such evidence via a non-electronic method to the Agency(ies), either prior to, or at the time of, the execution of the Contract.
- B. The Contractor agrees to adhere to such MWBE Utilization Plan in the performance of the Contract.

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- C. The Contractor further agrees that failure to submit and/or adhere to such MWBE Utilization Plan shall constitute a material breach of the terms of the Contract. Upon the occurrence of such a material breach, the Agency(ies) shall be entitled to any remedy provided herein, including but not limited to, a finding that the Contractor is non-responsive.

V. [MWBE Waiver Form, PROC-3](#)

- A. If the Contractor, after making good faith efforts, is unable to achieve the MWBE Contract Goals stated in the solicitation document and the Contract, the Contractor may submit a request for a waiver to the Agency(ies). Such waiver request must be supported by evidence of the Contractor's good faith efforts to achieve the maximum feasible MWBE participation towards the applicable MWBE Contract Goals. If the documentation included with the waiver request is complete, the Agency(ies) shall evaluate the request and issue a written notice of approval or denial within twenty (20) business days of receipt.
- B. If the Agency(ies), upon review of the MWBE Utilization Plan, quarterly MWBE Cumulative Payment Statement Reports described in Section VI, or any other relevant information, determines that the Contractor is failing or refusing to comply with the MWBE Contract Goals, and no waiver has been issued in regards to such non-compliance, the Agency(ies) may issue a notice of deficiency to the Contractor. The Contractor must respond to the notice of deficiency within seven (7) business days of receipt. Such response may include a request for partial or total waiver of MWBE Contract Goals.

VI. [Quarterly MWBE Cumulative Payment Statement Report, PROC-6](#)

The Contractor is required to submit a quarterly [MWBE Cumulative Payment Statement Report, PROC-6 form](#), hyperlinked herein, in accordance with the instructions indicated in the Contract, provided, however, that the Contractor may arrange to provide such report via a non-electronic method to the Agency(ies) by the 10<sup>th</sup> day following the end of each quarter (i.e., March 31<sup>st</sup>, June 30<sup>th</sup>, September 30<sup>th</sup> and December 31<sup>st</sup>) during the term of the Contract.

VII. **Liquidated Damages - MWBE Participation**

- A. Where the Agency(ies) determines that the Contractor is not in compliance with the requirements of this Appendix and the Contractor refuses to comply with such requirements, or if the Contractor is found to have willfully and intentionally failed to comply with the MWBE

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participation goals, the Contractor shall be obligated to pay liquidated damages to the Agency(ies).

- B. Such liquidated damages shall be calculated as an amount equaling the difference between:
1. All sums identified for payment to MWBEs had the Contractor achieved the contractual MWBE goals; and
  2. All sums actually paid to MWBEs for work performed or materials supplied under the Contract.
- C. In the event a determination has been made which requires the payment of liquidated damages and such identified sums have not been withheld by the Agency(ies), the Contractor shall pay such liquidated damages to the Agency(ies) within sixty (60) days after they are assessed. Provided, however, that if the Contractor has filed a complaint with the Director of the Division of Minority and Women's Business Development pursuant to 5 NYCRR § 142.12, liquidated damages shall be payable only in the event of a determination adverse to the Contractor following the complaint process.

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