

**TERMS AND CONDITIONS RELATING TO CONTRACTING WITH MINORITY-,
WOMEN-AND VETERAN- OWNED BUSINESSES**

I. UTILIZATION OF MINORITY-, WOMEN- AND VETERAN-OWNED BUSINESSES AS CONTRACTORS, MATERIAL SUPPLIERS AND EQUIPMENT LESSORS.

The Construction Manager shall meet the requirements set forth in this Exhibit. Failure to do so shall constitute a breach of contract and will result in imposition of liquidated damages as set forth in Section XII , or such other remedy as is available at law, in equity or by law. The Construction Manager shall incorporate the requirements set forth in this Exhibit into all subcontracts.

II. POLICY

It is the policy of the Owner that all businesses shall have equal opportunity to participate in the performance of contracts with the Owner and steps should be taken to ensure inclusion of minority, women, and veteran-owned businesses (MWVOB) in the Owner's contracts.

III. CONSTRUCTION MANAGER'S OBLIGATION

The Construction Manager agrees that all businesses shall have equal opportunity to participate in the performance of subcontracts with the Construction Manager and that the Construction Manager shall take steps to ensure inclusion of MWVOB in the performance of the Agreement. In this regard, the Owner and Construction Manager shall take all necessary and reasonable steps to ensure that MWVOBs are given equal opportunity to compete for and perform on the Construction Manager's subcontracts.

In connection with the award and performance of the contract, the Construction Manager shall comply with the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, and shall not discriminate in employment based upon race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer.

IV. GOALS FOR THIS PROJECT

A. GOAL

The Project includes a goal of awarding a minimum of fifteen percent (15%) of the total construction value to subcontractors, equipment lessors and/or material suppliers that are certified as MWVOBs or disadvantaged business enterprises (DBEs).

1. Failure by the Construction Manager to meet the minimum goal placed on this Project, or to use “good faith efforts” to meet the minimum goal, will constitute a breach of contract and may result in the Owner, imposing liquidated damages as outlined in Section XII below, or such other remedy as the Owner deems appropriate.
2. To be counted toward the above goal, an entity must have a valid, current Certification from the State of New Jersey, Division of Revenue and Enterprise Services (DORES), Uniform Certification Service, **OR** the New Jersey Unified Certification Program (NJUCP). Firms can apply for the DORES Certification at <https://www.njportal.com/DOR/SBERegistry/>. Firms may apply for NJUCP Certification through any one of the three NJUCP Certifying Partners - Port Authority of New York and New Jersey, New Jersey Transit Corporation (NJ Transit) or New Jersey Department of Transportation. NJUCP Links to search for certified vendors and to apply for certification are accessible at <https://njucp.dbesystem.com/default.asp>.
3. As a source of information only, there are other online directories of MWVOBs, including:
 - New Jersey Selective Assistance Vendor Information (https://www20.state.nj.us/TYTR_SAVI/vendorSearch.jsp) – NJSAVI is a database that identifies businesses that are registered as an SBE, DVBE, VBE and/or certified as an M/WBE with the State of New Jersey, through DORES;
 - Veteran Owned Business Directory (<https://www.veteranownedbusiness.com/>) - The Veteran Owned Business Project is a comprehensive, user-friendly member network directory of small, medium and large businesses owned by veterans, service-disabled veterans (SDVOSBs / DVBEs) active-duty military, reservists and military spouses.

Companies listed in these online directories may or may not be certified through DORES or NJUCP. Use of these directories does not relieve the Construction Manager of its responsibility to seek out other MWVOBs and DBEs that are not listed to either meet the goal stated above or demonstrate good faith efforts to do so.

B. DEFINITIONS

1. “Business” means an entity organized for profit including, but not limited to, an individual or individuals, sole proprietorship, partnership, Limited Liability Company, corporation, or joint venture.

2. An “MWVOB” is a business controlled by one or more minorities, women, and/or veterans.
3. “Control” (managerial and operational control) means authority over the affairs of a business, including, but not limited to, capital investment, property acquisition, employee hiring, contract negotiations, legal matters, officer and director selection, operating responsibility, financial transactions, and the rights of other shareholders or joint partners. Control shall not include absentee ownership. Control shall be deemed not to exist where an owner is not a minority in the case of a minority business; or where the owner is not a female in the case of a women's business. Additionally, control shall not be deemed to exist where someone, other than a minority or a woman, is disproportionately responsible for the operation of a business, or for policy and contractual decisions.
4. “Disadvantaged Business Enterprise” means a business that has been certified by any one of the three NJUCP Certifying Partners, pursuant to the Fixing America’s Surface Transportation Act, P.L. 114-94 (December 4, 2015), reauthorized by Infrastructure Investment and Jobs Act, Pub. L. 117–58 (November 15, 2021).
5. “Minority” means a person who is:
 - (a) Black, which is a person having origins in any of the black racial groups in Africa;
 - (b) Hispanic, which is a person of Spanish or Portuguese culture, with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;
 - (c) American Indian or Alaskan native, which is a person having origins in any of the original peoples of North America; or
 - (d) Asian American, which is a person having origins in any of the original peoples of the Far East, Southeast Asia, Indian Subcontinent, Hawaii, or the Pacific Islands.
6. “Minority business” means a business, pursuant to N.J.S.A. 52:27H-21.18, which is:
 - a. A sole proprietorship, owned and controlled by a minority;
 - b. A partnership or joint venture, owned and controlled by minorities in which at least 51 percent of the ownership interest is held by minorities and the management and daily business operations of which are controlled by one or more of the minorities who own it; or
 - c. A corporation or other entity, whose management and daily business operations are controlled by one or more minorities who own it, and which is at least 51 percent owned by one or more minorities, or, if stock is issued, at least 51 percent of the stock is owned by one or more minorities.

7. "Woman" or "women" means an individual, regardless of race, who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.
8. "Women's business" means a business, pursuant to N.J.S.A. 52:27H-21.18, which is:
 - a. A sole proprietorship owned and controlled by a woman;
 - b. A partnership or joint venture owned and controlled by women in which at least 51 percent of the ownership is held by women and the management and daily business operations of which are controlled by one or more women who own it; or
 - c. A corporation or other entity whose management and daily business operations are controlled by one or more women who own it, and which is at least 51 percent owned by women, or, if stock is issued, at least 51 percent of the stock is owned by one or more women.
9. A "Veteran" is any citizen and resident of this State now or hereafter honorably discharged or released under honorable circumstances who served in any branch of the Armed Forces of the United States or a Reserve component thereof for at least 90 days and shall include disabled veterans.
10. A "Veteran-owned business" is a business that has its principal place of business in the State, is independently owned and operated and at least 51% of the business is owned and controlled by persons who are veterans. The Principal Owner must provide copy of their Federal Form DD-214 indicating honorable discharge or release under honorable circumstances.

V. COUNTING MWVOB PARTICIPATION

- A. The Construction Manager may count toward its MWVOB goal only expenditures to MWVOB and DBE firms that perform a commercially useful function in the work of a contract. An MWVOB or a DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibility by actually performing, managing, and supervising the work involved. To determine whether an MWVOB or a DBE is performing a commercially useful function, the Construction Manager shall evaluate the amount of work subcontracted, industry practice and other relevant factors.
- B. If an MWVOB or a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce, or the MWVOB/DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is not performing a commercially useful function.
- C. If the Construction Manager is an MWVOB or a DBE, payments made to the Construction Manager for work performed by the Construction Manager will be

applied toward the MWVOB goal. Payments made to the Construction Manager for work performed by non-MWVOBs/DBEs will not be applied toward the goal.

- D. The Construction Manager may count sixty percent (60%) of its expenditures to MWVOB/DBE suppliers that are not manufacturers, provided that the MWVOB/DBE supplier performs a commercially useful function in the supply process. The Construction Manager may count one hundred percent (100%) of its expenditures to MWVOB/DBE suppliers that are also manufacturers. Manufacturers receive one hundred percent (100%) credit toward the MWVOB goal.
- E. When an MWVOB/DBE subcontractor sublets part of the work of its contract to another firm, the value of the subcontract work may be counted towards the MWVOB goals only if the subcontractor itself is an MWVOB/DBE. Work that an MWVOB/DBE subcontractor subcontracts to a non-MWVOB/DBE firm, does not count toward MWVOB goals.

VI. GOOD FAITH EFFORTS

If the Construction Manager fails to meet the MWVOB goal, it will be required to demonstrate to the Owner's satisfaction that it used good faith efforts to meet the goal. To demonstrate good faith efforts to meet the MWVOB contract goals, the Construction Manager must show that it took all necessary and reasonable steps to achieve the goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient MWVOB/DBE participation, even if they were not fully successful. The following is a list of types of actions which could be evidence of good faith efforts to obtain MWVOB/DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive.

- A. Conducting market research to identify MWVOBs and DBEs and soliciting through all reasonable and available means the interest of all certified MWVOBs and DBEs that have the capability to perform the work contract and, if applicable and necessary to comply with the Project Labor Agreement, providing the MWVOBs and DBEs the opportunity to become signatories to union contracts.
- B. Attending pre-bid and business matchmaking meetings and events, if any, to inform MWVOBs/DBEs of subcontracting opportunities.
- C. Advertising in general circulation media, trade association publications, as well as MWVOB/DBE-focused media for at least twenty (20) days before bids are due. If twenty (20) days are not available, publication for a shorter reasonable time is acceptable.
- D. Providing written notification to MWVOBs/DBEs that their interest in the contract is solicited.

- E. Selecting portions of the work to be performed by MWVOBs/DBEs in order to increase the likelihood that the MWVOB goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate MWVOB/DBE participation, and where appropriate, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates MWVOB/DBE participation.
- F. Demonstrating efforts to negotiate with MWVOBs/DBEs for specific sub-bids including at a minimum:
 - 1. The names, addresses and telephone numbers of MWVOBs/DBEs that were contacted;
 - 2. A description of the information provided to MWVOBs/DBEs regarding the plans and Specifications for portions of the work to be performed; and
 - 3. A statement of why additional agreements with MWVOBs/DBEs were not reached;
- G. Providing information regarding each MWVOB/DBE the Construction Manager contacted and rejected as unqualified and the reasons for the Construction Manager's conclusion.
- H. Demonstrating efforts to assist the MWVOB/DBE in obtaining bonding or insurance required by the Construction Manager or the Owner.

NOTE: The fact that there may be some additional costs involved in finding and using MWVOBs/DBEs is not in itself sufficient reason for the Construction Manager's failure to meet the MWVOB goal, as long as such costs are reasonable. As part of the administrative reconsideration process, the Construction Manager will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made good faith efforts to do so. The Owner will send the Construction Manager a written final administrative decision on reconsideration, explaining the basis for finding that the Construction Manager did or did not meet the goal or make adequate good faith efforts to do so. The result of that process is appealable to the Appellate Division of the New Jersey Superior Court.

IX. SELECTION AND RETENTION OF SUBCONTRACTORS

- A. The Construction Manager is further obligated to provide the Owner with a listing of firms, organizations or enterprises solicited and those utilized as subcontractors on the proposed project. Such listing shall clearly delineate which firms are classified as MWVOB.
- B. Efforts made to identify and retain an MWVOB as a substitution subcontractor when the arrangements with the original MWVOB proved unsuccessful, shall be submitted

in writing to the Owner for approval. Work in the category concerned shall not begin until such approval is granted in writing.

- C. Notification of a subcontractor's termination will be sent to the Owner by the Construction Manager. Said termination notice will include the subcontractor's classification (i.e., whether it is a DBE or a minority, women, or veteran-owned firm) and the reason for termination.

X. DOCUMENTATION

- A. The Construction Manager must submit a "*Set Aside Contract Report*" (**Item E on Exhibit E** and also available via <https://www.njeda.gov/bidding/#forms>), with its invoice, to the Owner. Invoices will not be processed unless accompanied by the "*Set Aside Contract Report*." In addition, the Owner may at any time require such information as is deemed necessary in the judgment of the Owner to ascertain the compliance of the Construction Manager with the terms of this Exhibit.

B. Record and Reports.

The Construction Manager shall keep such records as are necessary to determine compliance with its obligations. The records kept by the Construction Manager will be designed to indicate:

1. The names of MWVOB/DBE subcontractors, equipment lessors and material suppliers contacted for work on this project;
2. The type of work to be done, materials to be utilized or services to be performed other than the work of the prime Construction Manager on the project;
3. The actual dollar value of work subcontracted and awarded to MWVOBs/DBEs;
4. The progress being made, and efforts taken in seeking out and utilizing MWVOBs/DBEs – including solicitations, quotes and bids regarding project work items, supplies, leases, etc.;
5. Documentation of all correspondence, contacts, telephone calls, etc., to obtain the services of MWVOBs/DBEs on this project; and
6. Records of all MWVOBs/DBEs and non-MWVOBs that have submitted quotes/bids to the Construction Manager on the project.

- C. The Construction Manager shall maintain all documents and other records as set forth in the contract, including as follows:

1. If federal funding is utilized, three (3) years after the anticipated date of submission of the final expenditure report (as required by 2 C.F.R. § 200.334(d)).

XI. PAYMENT TO SUBCONTRACTOR

The Construction Manager agrees to pay its subcontractors in accordance with the Agreement.

XII. NON-COMPLIANCE

The Construction Manager’s failure to comply with the requirements of this Exhibit shall constitute a breach of contract and may result in imposition of liquidated damages or such other remedy as the Owner deems appropriate.

At the Owner’s option, such a breach of contract may result in the imposition of liquidated damages. The Owner and the Construction Manager agree that it would be extremely difficult to determine actual damages that the Owner would sustain as the result of the Construction Manager’s failure to meet the requirements of this Exhibit. Any breach by the Construction Manager: will prevent the Owner from ensuring that MWVOBs are given equal opportunity to compete for, perform on and receive compensation for Owner contracts or subcontracts; will adversely impact the State’s ability to ensure a stronger and fairer State economy; and may lead to damages suffered by the Owner and the State as a whole. If the Construction Manager fails to meet the goal *and* fails to demonstrate good faith efforts to the satisfaction of the Owner, the Owner may assess liquidated damages against Construction Manager as follows:

<i>If the Construction Manager fails to provide good faith effort and awards zero percent (0%) of the total construction¹ value to MWVOBs</i>	<i>15% of the base CM fee.</i>
<i>If the Construction Manager fails to provide good faith effort and awards more than 0% but less than 15% of the total construction value to MWVOBs</i>	<i>This is a reciprocal sliding scale based on the maximum above noted 15% of the base CM fee. For example, if the CM achieves 3% participation, the penalty would be 12% of the base fee. If the CM achieves 12.5% participation, they penalty would be 2.5% of the base fee.</i>

The Parties agree that these liquidated damages are reasonable estimates of the damages the Owner may sustain if the Construction Manager fails to meet its obligations under this Exhibit and are not to be construed as penalties.

¹ Preconstruction services will not be counted towards total construction value

Failure to meet the requirements of this Exhibit will result in imposition of liquidated damages as set forth in Section XII , or such other remedy as is available at law, in equity or by law.

Upon determination that liquidated damages are to be assessed, the Owner shall notify the Construction Manager of the assessment in writing. The Owner may, in its sole discretion, give the Construction Manager an opportunity to cure depending on the situation. The Owner may elect to notify the Construction Manager that liquidated damages may be assessed so as to provide a warning, prior to assessing liquidated damages, but if the Owner does not provide such a warning the Owner is not precluded from assessing liquidated damages. Failure to assess liquidated damages or to demand payment of liquidated damages within any period of time shall not constitute a waiver of such claim by the Owner.

Once assessed, the Owner will deduct liquidated damages from any moneys it owes to the Construction Manager, and in the event the amount due the Construction Manager is not sufficient to satisfy the amount of the liquidated damages, the Construction Manager shall pay the balance to the Owner within thirty (30) calendar days of written notification of the assessment. If the amount due is not paid in full, the balance will be deducted from subsequent payments to the Construction Manager.

To the extent permitted by law, the Owner will endeavor to use all amounts paid as liquidated damages to support its diversity and inclusion efforts. This may include any costs associated with: providing race- and gender-neutral programs to remedy the effects of disparities between the availability of MWVOBs to perform the Owner's contracts or subcontracts and the utilization of MWVOBs to perform the Owner's contracts or subcontracts; developing and implementing race- and gender-conscious programs to remedy the effects of any such disparities; and/or taking steps to reduce (or even eliminate) marketplace barriers that adversely affect the participation of MWVOBs in the Owner's contracts.

XIII. SEVERABILITY

If this Exhibit or any part of this Exhibit is declared unenforceable or invalid, the remainder will continue to be valid and enforceable. If this Exhibit is the subject of a legal challenge after the Agreement has been entered into, the Owner reserves the right to (i) revise or delete this Exhibit and (ii) require the Construction Manager to reduce its Fee by a reasonable amount to take into account the revisions to, or deletion of, this Exhibit, subject to a maximum reduction of 10% of the Fee.