

NEW YORK STATE DEPARTMENT OF TRANSPORTATION  
**M/WBE UTILIZATION WORKSHEET**

CONTRACT NO	COUNTY	F.A. PROJECT NO	PAGE NO OF	DATE SUBMITTED / /
CONTRACTOR NAME AND ADDRESS (include zip code)		SUBCONTRACTOR NAME AND ADDRESS (include zip code)		
TELEPHONE NO: ( )		TELEPHONE NO: ( )		
<p>The Contractor shall inform the Engineer in Charge the dates when the Subcontractor starts and completes all work under the sub-contract. When work performed by the Subcontractor is included in an estimate for payment, labor affidavits, copies of payrolls, etc., are to be submitted in the same manner and number as required of the Prime Contractor.</p>		SUBCONTRACTOR FED. IDENT. NO.:		
		EST. BEGINNING DATE (Mo. & Yr.) /	EST. COMPLETION DATE (Mo. & Yr.) /	

This approval may be rescinded at any time in the progress of the work if work of the Subcontractor is determined unsatisfactory. No work may be assigned by the Subcontractor to a second tier Subcontractor. No work may be performed by a Subcontractor other than that specifically approved by the Regional Director. The signators below agree that violations of the foregoing may result in no payment by the State for the related work.

No work shall be started by the Subcontractor prior to filing the required insurances. The Contractor and Subcontractor hereby certify that the subcontract is in writing, and contains all the pertinent provisions of the prime contract in regard to Federal and State Laws and Regulations.

Signature \_\_\_\_\_ Contractor \_\_\_\_\_ Date \_\_\_\_\_ Signature \_\_\_\_\_ Subcontractor \_\_\_\_\_ Date \_\_\_\_\_

ITEM NO	NAME	Less Than 100%	BID AMOUNT		AGREED AMOUNT \$	% to CNT
			\$ SPECIALTY	\$ NON-SPECIALTY		
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						
<b>TOTALS</b>			\$	\$	\$	

The Subcontractor named above is approved for utilization under the provisions of Standard Specification §102-21. Approval of this worksheet conveys only the Department's concurrence in the use of the named subcontractor for the items specified, and application of the D/M/WBE Agreed Amount to the participation goals of the contract. Regional approval of an Approval to Subcontract form HC 89 is required prior to subletting or otherwise assigning any part of the contract.

APPROVED FOR OFFICE OF EQUAL OPPORTUNITY DEVELOPMENT AND COMPLIANCE BY: \_\_\_\_\_ DATE APPROVED: \_\_\_\_/\_\_\_\_/\_\_\_\_

WHITE — Main Office (PART 1)  
YELLOW — Regional Office (PART 2)



Contract D \_\_\_\_\_ Solicitation Date \_\_\_\_\_

Prime Bidder \_\_\_\_\_

(Note: Check all applicable statements)

\_\_\_\_\_ Our firm is available to participate in the work of this contract, and:

- [11] \_\_\_\_\_ I have prepared and submitted a written quotation
- [12] \_\_\_\_\_ I have prepared and submitted a verbal quotation
- [13] \_\_\_\_\_ I am negotiating with the prime bidder regarding this contract
- [14] \_\_\_\_\_ I am developing a quotation to submit to the bidder

\_\_\_\_\_ Our firm is unable to participate in the contract for the following reason(s):

- [21] \_\_\_\_\_ Not certified to perform the work of this contract
- [22] \_\_\_\_\_ Location of the work is unacceptable
- [23] \_\_\_\_\_ Could not agree with the prime bidder on a price
- [24] \_\_\_\_\_ Could not prepare a bid within the time allowed
- [25] \_\_\_\_\_ Scheduling of the work is unacceptable
- [26] \_\_\_\_\_ Other (describe): \_\_\_\_\_

Subcontractor

Signature \_\_\_\_\_

Signed by \_\_\_\_\_

Title & Firm Name \_\_\_\_\_

Federal Employment ID No. \_\_\_\_\_

Date \_\_\_\_\_

INSTRUCTIONS FOR COMPLETING FORM AAP-10

DIMIWBE SUBCONTRACTOR AND SUPPLIER SOLICITATION LOG

New York State Department of Transportation Standard Specification §102.21 requires Prime Contractors to report efforts to solicit participation by Disadvantaged, Minority and Women-owned Business Enterprises in construction contracts. The DIMIWBE Subcontractor and Supplier Solicitation Log is used for this purpose. The log is to be maintained by each prospective bidder throughout the bid development subcontractor solicitation period. THE APPARENT LOW BID MUST COMPLETE ALL SECTIONS OF THIS FORM AS A PREREQUISITE TO CONTRACT AWARD AND SUBMIT IT, ALONG WITH FORMS AAP 11 (D/M/WBE SOLICITATION RESPONSE) OR PRESCRIBED ALTERNATIVES, TO DOCUMENT GOOD FAITH EFFORT IN THE DEVELOPMENT OF A D/M/WBE UTILIZATION PLAN. The plan, as described in Standard Specification §102.21, will be submitted to the Office of Equal Opportunity Development and Compliance (EODC).

**CONTRACT NO:** Enter N.Y. State contract number (Example: D251726)

**COUNTY:** Enter name of county or counties (Example: Albany & Essex)

**LETTING DATE:** Enter the date (Month/Day/Year) on which this project is scheduled to be let.

**PAGE NO:** Enter 1 of 1; 1 of 2; 2 of 2; etc. Use additional forms as needed

**PARTICIPATION GOALS:** Enter OBE participation goal(s) as stated in the proposal.

**CONTRACTOR NAME AND ADDRESS:** Enter name and address (including zip code) and telephone number (including area code) of your firm.

**CONTACT PERSON:** Enter the name of the person in your firm who has been designated as the compliance contact person for this contract.

**CONTRACTOR FEDERAL IDENT. NO:** Enter your Federal employer identification number.

**COMPANY NAME AND CONTACT PERSON'S NAME:** Enter the name of the solicited firm and the name of the individual associated with the firm to whom the solicitation inquiry was sent or with whom subcontract negotiations have taken place.

**FEDERAL EMPLOYER IDENTIFICATION NO:** Enter the Federal employer identification number of the solicited firm.

**TELEPHONE NUMBER:** Enter the telephone number (including area code) of the Solicited firm.

**WORK TYPE(S) BEING SOLICITED:** Enter the work type(s) for which this firm has been solicited in connection with this contract. (NOTE: Work type codes are provided for every firm listed in the Registry of Disadvantaged Minority/Women-owned Business Enterprises issued by the New York State Department of Transportation. If a firm is solicited that is not included in the NYSDOT Registry but is included in the Directory of Certified Minority and Women-owned Business Enterprises issued by the New York State Department of Economic Development, enter the appropriate SIC code listed for the firm in the DED Directory.)

**TYPES AND DATES OF CONTACT:** Enter dates on which your firm has contacted the solicited firm, either by mail (date solicitation inquiries sent), telephone (including time of call) or other person-to-person contacts. Identify the type of contact by prefacing each date with "M" if a mail contact; "T" if a telephone call; and "D" if a direct meeting with the firm.

**D/M/WBE RESPONSE CODE:** Enter the code(s) (11 through 14; 21 through 28) for the response(s) checked by the solicited firm on form AAP 11 (Solicitation Response).

**BIDDER ACTION CODE:** Enter the code describing your action in this proposal with respect to the solicited firm, as follows:

CODE	DESCRIPTION
31	This firm has been selected for utilization in the contract.
32	This firm is unavailable to participate in the contract for the reason(s) stated on the Solicitation Response.
33	This firm is no longer in business. (NOTE: If this action is checked, attach your explanation as to why the solicitation was sent to the firm and how evidence that it was no longer in business was obtained.)
34	A solicitation inquiry to this firm was returned as undeliverable. (NOTE: if this response is checked, attach the returned envelope showing that it was undeliverable.) We were unable to reach this firm in a telephone follow-up to the solicitation inquiry. (NOTE If this response is checked, indicate in the Dates of Contact column the dates and times at which follow-up was attempted.)
36	This firm did not respond to telephone messages. (NOTE: If this response is checked, indicate in the Dates of Contact column the dates <u>and times</u> at which messages were left).
37	This firm has not been selected for utilization in the contract. (NOTE If this response is checked, attach an explanation for this action. If a quote was provided by the firm, a copy of it must be attached.)



**DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION (continued)**

NO TEXT

**MINORITY/WOMEN BUSINESS ENTERPRISE UTILIZATION**

**NEW YORK CITY DEPARTMENT OF TRANSPORTATION**

**MINORITY/WOMEN BUSINESS ENTERPRISE**

**UTILIZATION REQUIREMENTS**

The Department has established the following Minority/Women Business Enterprise (M/WBE) utilization goal for this contract. This goal is expressed as a percentage of the total contract bid price. It is the Contractor's responsibility to secure utilization in the work of the contract by M/WBE's in satisfaction of the goal, and to document satisfactory good-faith efforts taken to fulfill the goal. M/WBE firms must be certified by New York State Department of Transportation Equal Opportunity Development and Compliance ("EODC") for all items to be performed. Utilization is measured as the amount actually paid to DBE's, not the contract bid price for the work.

Minority/Women Business Enterprise Utilization Goal is:	MBE:	09%
	WBE:	09%
	Total:	18%

**Minority/Women Business Enterprise Registry**

A current listing of certified MWBE's is available, upon written request from:

New York City Department of Transportation Office of Contract Compliance  
40 Worth Street, Room 1228, New York, NY 10013, (212) 442-7597

New York State Web Site: <http://www.nylovesmwbe.ny.gov/cf/search.cfm>

**Minority/Women Business Enterprise Officer**

The Bidder shall designate and enter below the name of Minority/Women Business Enterprise Officer will have the responsibility for and is capable of effectively administering and promoting and active Minority/Women Business Enterprise Program and who must be assigned adequate authority and responsibility to do so.

Proposer-Designated M/WBE Officer:

\_\_\_\_\_  
(Name, Title)

Telephone:

\_\_\_\_\_  
**RETURN THIS PAGE WITH PROPOSAL.**

**102-12 D/M/WBE UTILIZATION.**

D/M/WBE is a general term that refers to a Disadvantaged Business Enterprises (DBEs), Minority Business Enterprises (MBEs) and Women's Business Enterprises (WBEs). The DBE program applies to Federal-Aid contracts, and the MBE/WBE (M/WBE) program applies to non Federal-Aid contracts. The Department seeks to:

- Ensure nondiscrimination in award and administration of Department contracts;
- Ensure that only firms that fully meet D/M/WBE eligibility standards are permitted to participate in the Department's D/M/WBE programs;
- Help remove barriers to the participation of D/M/WBEs in the performance of Department contracts;
- Create a level playing field on which D/M/WBEs can fairly compete for Department contracts; and
- Assist in the development of firms that can compete successfully in the construction industry outside the D/M/WBE programs.

The parties to this contract shall take all necessary and reasonable steps in accordance with the laws, rules and regulations cited in this subsection to promote the objectives outlined above. The Contractor shall comply with the applicable laws, rules and regulations and the D/M/WBE Program requirements stated below. The Contractor shall not discriminate on the basis of race, color, national origin, or sex in

**NEW YORK STATE DEPARTMENT OF TRANSPORTATION  
STANDARD SPECIFICATIONS of May 4, 2006**

the award and performance of Department contracts. These requirements shall be made a part of all subcontracts and agreements entered into as a result of this contract.

#### **A. Statutory Authority.**

**1. Disadvantaged Business Enterprise (DBE) Program.** The Federal statutory authority for the DBE Program is contained in the Surface Transportation Assistance Act of 1982 (Public Law 97-424, §105(f)), the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17, §106(c)), the Intermodal Surface Transportation Efficiency Act of 1991, and the Transportation Equity Act of the 21st Century. New York State has enacted Section 85 of the Highway Law and Section 428 of the Transportation Law. Regulations have been promulgated under 49 CFR 26 and 17 NYCRR 35.

**2. Minority/Women's Business Enterprise (M/WBE) Program.** The State statutory authority for the M/WBE Program is contained in Section 85 of the Highway Law, Section 428 of the Transportation Law, and Executive Law Article 15A. Regulations have been promulgated under 5 NYCRR 140. The parties to this contract shall comply with these laws, rules and regulations and the M/WBE Program requirements stated below.

### **GENERAL PROVISIONS**

**B. Goal(s).** Federal-aid contracts have a single DBE goal. Non Federal-Aid contracts have two separate and distinct goals, one for MBEs and one for WBEs, which cannot be combined.

**1. Established Goal(s).** The Department may have established contract utilization goal(s) for D/M/WBEs, which are expressed as a percentage of the total contract price. The goal(s) are stated in the proposal and remain in effect throughout the life of the contract. In executing the contract or bid documents the Bidder declares that it subscribes to the utilization goal(s) and shall meet the goal(s) or demonstrate that it could not meet them despite its best efforts. Failure to meet the established goal(s) for the contract and failure to meet the good faith efforts, as defined in paragraph F Good Faith Efforts, may be grounds for rejection of the bid as non-responsive. When the contract is awarded with D/M/WBE participation that is less than the contract goal(s), the Contractor shall continue good faith efforts throughout the life of the contract.

**2. Zero Percent Goal(s).** When the Department has established zero goal(s) for participation by D/M/WBEs and the Bidder proposes the use of a Subcontractor or the purchase of goods from a material supplier at any time during the life of the contract, the Contractor shall promote the objectives outlined in this subsection by providing opportunities for D/M/WBEs to participate in these areas, with such participation to be credited towards the race-neutral component of the Department's D/M/WBE Programs.

**C. Counting D/M/WBE Participation Towards the D/M/WBE Goal(s).** A D/M/WBE that holds a Department contract may not count its own utilization in the contract toward the D/M/WBE contract goal(s).

The value of work actually performed by the D/M/WBE will be counted toward the goal(s) in the amounts set forth below. The proposed utilization must be considered to be a commercially useful function, as defined in paragraph D(1) Commercially Useful Function. If the Department determines that some or all of the D/M/WBE's work does not constitute a commercially useful function, only the portion of the work considered to be a commercially useful function will be credited toward the goal(s).

D/M/WBE participation will be counted toward meeting the D/M/WBE goal(s) in accordance with the following:

#### **1. Eligibility.**

*a. DBE Eligibility.* Only those DBE firms that are certified by the Department are eligible to be used for goal attainment on this contract. A DBE must be certified on the day the contract is let. DBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as a DBE.

*b. M/WBE Eligibility.* Only those M/WBE firms that are certified by the NYS Department of Economic Development are eligible to be used for goal attainment on this contract. An M/WBE must be certified on the day the contract is let. M/WBE certification is not an endorsement of the quality or performance of the business but simply an acknowledgment of the firm's status as an M/WBE. The participation of a firm that is certified as both an MBE and a WBE will only be counted toward one goal, and cannot be divided between the two goals. Changes in the goal towards which participation applies after participation begins shall require Department approval in accordance with Paragraph J. *Revisions in D/M/WBE Utilization.*

**2. Subcontracting.** The total agreed value of work to be performed by the D/M/WBE's own forces is counted toward the D/M/WBE goal(s), except as provided in numbers 3 through 6 below.

**3. D/M/WBE Joint Ventures.** A D/M/WBE Joint Venture may be between a D/M/WBE and the Contractor, a majority Subcontractor or another D/M/WBE. The total dollar value of the contract equal to the distinct, clearly defined portion of the contract work that the D/M/WBE performs with its own equipment, with its own forces, and under its own supervision will be counted toward the D/M/WBE contract goal(s), subject to approval by the Department of the D/M/WBE joint venture agreement to be furnished by the Bidder before contract award. The D/M/WBE joint venture agreement shall include a detailed breakdown of the following:

- Contract responsibility of the D/M/WBE for specific contract items of work;
- Capital participation by the D/M/WBE;
- Specific equipment to be provided to the joint venture by the D/M/WBE;
- Specific responsibilities of the D/M/WBE in the control of the joint venture;
- Specific staffing and skills to be provided to the joint venture by the D/M/WBE; and
- Percentage distribution to the D/M/WBE of the projected profit or loss incurred by the joint venture.

**4. Vendors.** Expenditures for materials and supplies obtained from D/M/WBE Vendors, including Manufacturers, Fabricators, Material Suppliers, Brokers, and Manufacturers' Representatives in the amounts noted below will be counted toward the D/M/WBE goal(s). The D/M/WBE Vendor shall assume the actual and contractual responsibility for the provision of the materials and supplies. The cost of supplies purchased or materials or equipment leased from the Contractor, other Subcontractors on the contract, or their affiliates will not be counted.

The Bidder shall indicate on the *D/M/WBE Utilization Worksheet*, the 3 digit core specification section number(s) of the material to be supplied, manufactured, fabricated, or otherwise provided. If the material does not correspond to a Department contract pay item, use the following item numbers if applicable, and include in the description the contract pay item(s) to which the activity relates:

- 00.00 Supply of Eligible Materials
- 00.01 Provision of Eligible Manufactured or Altered Material
- 00.02 Rental of Equipment
- 00.05 Provision of Security Devices

*a. Manufacturers/Fabricators.* Count 100% of the expenditure to a D/M/WBE Manufacturer or Fabricator.

*b. Material Suppliers.* Count 60% (sixty percent) of the expenditure to a D/M/WBE Material Supplier, as defined in §101-02 *Definitions of Terms*. Packagers, brokers, manufacturers'

representatives, or other persons who arrange or expedite transactions are not Material Suppliers within the meaning of this paragraph.

*c. Brokers/Manufacturer's Representatives.* With respect to materials or supplies purchased from a D/M/WBE which is neither a Manufacturer nor a Fabricator nor a Material Supplier, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees for transportation charges for the delivery of materials or supplies required toward the D/M/WBE goal(s), provided they are determined by the Department to be reasonable and not excessive as compared with fees customarily allowed for similar services. The cost of the materials and supplies themselves are not counted.

**5. Trucking Operations.** Count toward the D/M/WBE goal(s) the expenditure for trucking provided by certified D/M/WBEs in accordance with the following:

*a.* To satisfy the criterion of performing a commercially useful function, a D/M/WBE shall own and operate at least one registered, insured, and fully operational truck used on the contract and shall be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the D/M/WBE goal(s).

*b.* The D/M/WBE receives credit for 100% of the value of the trucking operations it provides on the contract using trucks it owns or leases on a long-term basis that are registered, insured, and operated by the D/M/WBE using drivers it employs.

*c.* The D/M/WBE may lease trucks on a short-term basis from another D/M/WBE, including an owner/operator who is certified as a D/M/WBE. The D/M/WBE who leases trucks from another D/M/WBE receives credit for 100% of the value of the trucking operations that the lessee D/M/WBE provides on the contract.

*d.* The D/M/WBE may lease trucks on a short-term basis from a non-D/M/WBE, including an owner-operator. The D/M/WBE who leases trucks from a non-D/M/WBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The D/M/WBE does not receive credit for the value of the trucking operations provided by the lessee, because these services are not provided by a D/M/WBE.

*e.* The Bidder shall provide the following with the D/M/WBE Utilization Package:

1. Copies of all lease agreements utilized by the D/M/WBE; and
2. Calculations and any pertinent documentation that support the dollar value of the proposed D/M/WBE trucking operations; e.g., method of payment (hour, ton or load hauled), the number of trucks required to perform the trucking operations listed on the *D/M/WBE Utilization Worksheet*, and the duration of the trucking operations to be performed.

*f.* The Bidder shall indicate in the form of an explanation on the *D/M/WBE Utilization Worksheet*, the Specification section number(s) (3 digits) for which the trucking operations are to be performed, the type of trucking operation to be performed (i.e., on-site vs. off-site), and the corresponding dollar value for those operations, per item. Material that does not correspond to a Department contract pay item, should use the following item number if applicable:

99.99 Provision of Eligible Trucking Services

*g.* The D/M/WBE trucking firm of record is the firm that is listed on the *D/M/WBE Utilization Worksheet*. The D/M/WBE trucking firm of record must control the day-to-day trucking operations on the contract, and be responsible for:

1. Negotiating and executing rental/leasing agreements;
2. Hiring and firing the work force;
3. Coordinating the daily trucking needs with the Contractor; and
4. Scheduling and dispatching trucks.

**6. Partial Items.** The Bidder shall explain, in writing, the scope of work to be performed by the D/M/WBE for all items indicated as partial items on the *D/M/WBE Utilization Worksheet* at the time the Bidder submits the Utilization Package.

**7. Other.** Count the entire amount of fees or commissions charged by a D/M/WBE for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the contract, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services.

**D. Conditions of Participation.** D/M/WBE participation will be counted toward meeting the D/M/WBE contract goal(s), subject to all of the following conditions:

**1. Commercially Useful Function.** A D/M/WBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of work on a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved in accordance with normal industry practice. Regardless of whether an arrangement between the Contractor and the D/M/WBE represent standard industry practice, if the arrangement erodes the ownership, control or independence of the D/M/WBE or in any other way does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the goal(s) and may be required to backfill the participation in accordance with Paragraph I *Conformance to D/M/WBE Schedule of Utilization*. A D/M/WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction or contract through which funds are passed in order to obtain the appearance of D/M/WBE participation.

A DBE may rebut a determination by the Department that the DBE is not performing a commercially useful function to the FHWA but the determination may not be appealed to USDOT. An M/WBE may rebut a determination by the Department that the M/WBE is not performing a commercially useful function to the NYS Department of Economic Development.

**2. Work Force.** The D/M/WBE must employ a work force, (including administrative and clerical) separate and apart from that employed by the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude the employment by the D/M/WBE of an individual that has been previously employed by another firm involved in the contract, provided that the individual was independently recruited by the D/M/WBE in accordance with customary industry practice. The routine transfer of work crews from another employer to the D/M/WBE shall not be allowed.

**3. Supervision.** All work performed by the D/M/WBE must be controlled and supervised by the D/M/WBE without duplication of supervisory personnel from the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude routine communication between the supervisory personnel of the D/M/WBE and other supervisors necessary to coordinate the contract work.

**4. Equipment.** D/M/WBE Subcontractors may supplement their equipment by renting or leasing additional equipment in accordance with customary industry practice. However, no more than 50% of the equipment required to perform the work of the Subcontractor may be obtained from the Contractor, other Subcontractors on the contract, or their affiliates. If the D/M/WBE obtains equipment from any of those sources, the D/M/WBE shall provide documentation to the Department demonstrating that similar equipment and terms could not be obtained at a lower cost from other customary sources of equipment. The required documentation shall include, but not be limited to, copies of the rental or leasing agreements, and the names, addresses, and terms quoted by other sources of equipment.

## PRE-AWARD PROVISIONS

**E. Requests For Waiver.** A potential bidder may request a waiver of all or part of a contract's D/M/WBE goal(s) by submitting a written request to OEODC. A potential bidder is defined as one who has purchased the contract documents. The request shall be submitted no later than twenty-five (25) calendar days prior to the contract letting, in order to allow sufficient time for a review and issuance of an amendment of the established goal(s), if necessary, in accordance with the Department's schedule for contract amendments. The request should contain sufficient justification as to why the goal(s) should be waived or reduced, and should at least address the following factors: the potential Bidder's method of accomplishing the work, the subcontracting opportunities associated with the proposed method, and the availability of certified D/M/WBEs for the work to be subcontracted.

**F. Good Faith Efforts.** To determine whether a bidder that has failed to meet the D/M/WBE contract goal(s) may receive the contract, the Department will decide whether the efforts the Bidder made to obtain D/M/WBE participation were "good faith efforts" to meet the goal(s). Efforts that are merely pro forma are not good faith efforts to meet the goal(s). Efforts to obtain D/M/WBE participation are not good faith efforts to meet the goal(s), even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of D/M/WBE participation sufficient to meet the goal(s). In order to award a contract to a bidder that has failed to meet the D/M/WBE contract goal(s), the Department will determine that the Bidder's efforts were those that, given all relevant circumstances, a bidder actively and aggressively seeking to meet the goal(s) would make.

In order to evaluate the Bidder's conformance to this subsection, the Department will consider the quality, quantity, and intensity of the different kinds of efforts that the Bidder has made. The following is a list of the types of actions which the Department will consider as part of the Bidder's good faith efforts to obtain D/M/WBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exhaustive or exclusive. Other factors or types of efforts may be relevant in appropriate cases.

The following is a list of the kinds of efforts that the Department will evaluate to determine if the Bidder has demonstrated a good faith effort:

1. Efforts to secure participation by certified D/M/WBE firms for work that they are listed to perform that is in the contract. Only DBEs certified by the Department shall be used to fulfill the established goal on Federal-Aid contracts. Only M/WBEs certified by the NYS Department of Economic Development shall be used to fulfill the established goal(s) on non Federal-Aid contracts.
2. Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified D/M/WBEs who have the capability to perform the work of the contract. The Bidder shall solicit this interest within sufficient time to allow the D/M/WBEs to respond to the solicitation. The Bidder shall determine with certainty if the D/M/WBEs are interested by taking appropriate steps to follow up on initial solicitations.
3. *a.* The Bidder shall, at a minimum, seek certified D/M/WBEs in the same geographic area where the contract is located. This is defined as a one hundred (100) kilometer radius around the city, town or borough where the contract is located as identified in the contract proposal. For specialty work such as pavement markings, guide rail, etc. (as defined in the contract proposal) the Bidder shall, at a minimum, solicit on an upstate or downstate basis, depending upon the location of the contract.  
*b.* The Department has facilitated identification of upstate, downstate and areas within a 100 km radius through its automated D/M/WBE solicitation program, which is accessible on the Internet on the Department's Web Page at [www.dot.state.ny.us](http://www.dot.state.ny.us). For more information contact the NYSDOT Help Desk at (518) 485-8111. For bidders who do not have internet capability, a hard copy solicitation report for a specific contract can be requested by contacting the OEODC Construction Program Unit at (518) 457-1129.
4. Selecting portions of the work to be performed by D/M/WBEs in order to increase the likelihood that the D/M/WBE goal(s) will be achieved. This includes, where appropriate, either breaking down operations within the contract or combining like or related operations in the contract into logistically and economically feasible units to facilitate D/M/WBE participation,

even when the Contractor might otherwise prefer to perform these work items with its own forces.

5. Providing interested D/M/WBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

6. a. Negotiating in good faith with interested D/M/WBEs. It is the Bidder's responsibility to make a portion of the work available to D/M/WBE Subcontractors and material suppliers and to select those portions of the work or material needs consistent with the available D/M/WBE Subcontractors and material suppliers, so as to facilitate D/M/WBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of D/M/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for D/M/WBEs to perform the work.

b. The fact that there may be some additional costs involved in finding and using D/M/WBEs is not in itself sufficient reason for a bidder's failure to meet the contract D/M/WBE goal(s), as long as such costs are reasonable. The ability or desire of a bidder to perform the work of a contract with its own organization does not relieve the Bidder of the responsibility to make good faith efforts. Bidders are not, however, required to accept higher quotes from D/M/WBEs if the price difference is excessive or unreasonable.

7. Not rejecting D/M/WBEs as unqualified without sound reasons based on a thorough investigation of their capabilities.

8. Making efforts to assist interested D/M/WBEs in obtaining bonding, lines of credit or insurance as required by the Department.

9. Making efforts to assist interested D/M/WBEs in obtaining necessary equipment, supplies, materials, or related assistance.

10. Effectively using the services of available minority/women focused media, trade associations, and contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of D/M/WBEs.

11. All bidders shall keep records of efforts to solicit and negotiate with D/M/WBEs, using the *Solicitation Log* as a continuing record of pre- and post-letting solicitation activity. When submitting a *D/M/WBE Schedule of Utilization* to the Department, the Apparent Low Bidder will attach the log, together with the supplemental information specified in the instructions for the *Solicitation Log* as evidence of good-faith efforts when the established D/M/WBE goal(s) for the contract have not been met utilizing certified D/M/WBEs. Such supplemental efforts shall include at least the following:

- a. All envelopes of solicitation inquires that were returned as undeliverable; and
- b. Any quotations submitted by D/M/WBEs that are not included in the *D/M/WBE Schedule of Utilization* with an explanation for the Bidder's action in each case.

12. Promptly executing an agreement with D/M/WBE Subcontractors/vendors.

**G. D/M/WBE Utilization Package.** Within seven (7) calendar days after bid letting, the Apparent Low Bidder shall submit a complete D/M/WBE utilization package consisting of:

1. D/M/WBE Schedule of Utilization;
2. *D/M/WBE Utilization Worksheet* (Co-signed by both the Contractor and the D/M/WBE); and
3. Documentation that substantiates good faith efforts.

If the Apparent Low Bidder has met or exceeded the established D/M/WBE goal(s) for the contract utilizing certified D/M/WBEs it is not necessary to submit documentation of good faith efforts. If the Apparent Low Bidder owns Department approved civil rights reporting software, the Bidder shall submit *D/M/WBE Schedule of Utilization* and *D/M/WBE Utilization Worksheet* forms generated by the approved software.

**H. Bidder's Failure to Comply.** The Department's acceptance of the Apparent Low Bidder's proposal is conditioned upon the Apparent Low Bidder's fulfillment of the requirements of this subsection. If the Apparent Low Bidder fails to submit a complete D/M/WBE utilization package within seven (7) calendar days after the bid opening and/or fails to attain the D/M/WBE utilization goal(s), and to satisfactorily document its good faith efforts, the bid may be declared incomplete and the deposit may be subject to forfeiture pursuant to §103-02 *Contract Execution*. The Apparent Low Bidder, upon receipt of written notification of his/her failure to comply with the requirements of this subsection shall have five (5) work days to carry out the corrective action(s) described in the notification.

If the Department determines that the Apparent Low Bidder has failed to meet the good faith effort requirements, the Department will, before awarding the contract, provide the Apparent Low Bidder an opportunity for administrative reconsideration by an official who did not take part in the original determination that the Apparent Low Bidder failed to meet the goal(s) or make adequate good faith efforts to do so. As part of this reconsideration, the Apparent Low Bidder shall have the opportunity to provide written documentation or argument and to meet in person with the Department's reconsideration official concerning the issue of whether it met the goal(s) or made adequate good faith efforts to do so. The Department will send the Apparent Low Bidder a written decision on reconsideration, explaining the basis for finding that the Apparent Low Bidder did or did not meet the goal(s) or make adequate good faith efforts to do so.

## POST AWARD PROVISIONS

**I. Conformance to D/M/WBE Schedule of Utilization.** The Contractor shall execute subcontracts or agreements with the D/M/WBEs identified on the approved *D/M/WBE Schedule of Utilization*, for work of the kind and amount identified therein. The Engineer will monitor the work of the contract to ensure that the D/M/WBEs identified on *D/M/WBE Schedule of Utilization* perform the work. Any direction by the Engineer to comply with the Schedule is a lawful direction under Article 8 No *Estimate on Contractor's Non-Compliance* of the contract agreement.

**J. Revisions to D/M/WBE Utilization.** After contract award, the Contractor shall obtain Department approval for significant revisions in D/M/WBE utilization prior to implementing any proposed change through submission of a revised *D/M/WBE Schedule of Utilization*, and a revised *D/M/WBE Utilization Worksheet* signed by both parties. Revisions shall be entered into, and generated from Department approved software in accordance with §105-21 *Civil Rights Reporting*. The following modifications will be considered a significant revision in D/M/WBE utilization:

1. Adding, removing or substituting a D/M/WBE.
2. Adding new item(s) of work to a D/M/WBE within a core (3 digit) contract pay item number (i.e. 606 - *Guide Railing*) not currently approved.
3. Significantly reducing the dollar value of or eliminating the D/M/WBE's item(s) of work. Significant reduction will be determined by the Engineer by comparison to the total D/M/WBE contract goal.

In the cases of reduction, removal or substitution, the Contractor shall provide written justification with a substantive basis for the change. A Contractor's ability to negotiate a more advantageous contract with another Subcontractor will not be considered a valid basis for change.

If the reduction of the D/M/WBE's work or the removal of the D/M/WBE, including for reasons of commercially useful function violations, causes the D/M/WBE utilization to fall below the goal(s), the Contractor shall make good faith efforts to find another D/M/WBE to substitute for the original D/M/WBE to perform at least the same amount of work as the D/M/WBE that was terminated, to the extent needed to meet the contract goal(s).

A D/M/WBE may be substituted if its intended work is deleted or reduced by the Department and enough work remains to substitute an equal amount to the affected D/M/WBE. If not enough work remains, the Department may relieve the Contractor from attaining that portion of the goal(s).

After contract award, the Contractor is not required to submit hard copy forms for non-significant revisions in D/M/WBE utilization. The following modifications will not be considered a significant revision in D/M/WBE utilization:

1. Increasing the dollar value of an item(s) of work or adding new item(s) of work within the same core (3 digit) contract pay item number (i.e. 606 - *Guide Railing*) to a D/M/WBE.
2. Substituting similar dollar values of work within a currently approved core (3 digit) contract pay item number (i.e. 606 - *Guide Railing*).

**K. Monitoring Contractor Compliance.** The Contractor shall allow authorized representatives of the Department to conduct periodic inspections of the Contractor's D/M/WBE participation efforts during the performance of this contract. When a Contractor has been found to have failed to meet the contract goal(s), to exert a good faith effort, or otherwise failed to comply with this subsection, the contract may be canceled, terminated, or suspended in whole or in part in accordance with Article 11 *Right to Suspend Work and Cancel Contract* of the contract agreement and Section 40 of the Highway Law.

**1. Measuring Goal Attainment.** Goal attainment will be measured based on payments made to D/M/WBEs. In order to measure goal attainment and to gauge the effect of goals on the industry, the Contractor shall report payments made to all D/M/WBEs and all majority Subcontractors participating in the contract. Reports of payments shall be made on a monthly basis for all Subcontractors/Vendors due payment for which there is an *Approval to Subcontract* or a *D/M/WBE Utilization Worksheet* on file with the Department, and at completion of the contract, in accordance with §105-21 *Civil Rights Reporting*. Reports made at contract completion shall be signed and notarized by both the Contractor and the Subcontractor/Vendor.

**2. DBE Program.** In order to determine whether the Contractor has complied with the requirements of this subsection, the Commissioner may direct the Contractor to attend a hearing before the Contract Review Unit, or may follow any other lawful procedure upon due notice in writing to the Contractor. The Contractor may also be referred to the USDOT for possible suspension or debarment as provided in 49 CFR 29 and such other sanctions as may be imposed and remedies invoked as provided under the authority of 49 CFR 26, or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

**3. M/WBE Program.** In order to determine whether the Contractor has complied with the requirements of this subsection, the Commissioner may direct the Contractor to attend a hearing before the Contract Review Unit, or may file a complaint with the NYS Department of Economic Development, Division of Minority and Women's Business Development pursuant to Executive Law, Article 15A, Section 316, or may follow any other lawful procedure upon due notice in writing to the Contractor. Such other sanctions may also be imposed and remedies invoked as provided under the authority of Executive Law Article 15A, 5 NYCRR 140 et seq., or by rule, regulation, or order of the Commissioner or as otherwise provided by law.

**L. Prompt Payment.** The Contractor shall pay the D/M/WBE in accordance with §109-06, *Contract Payments* and §109-07, *Prompt Payments by the Contractor*. Failure by the Contractor to do so may result in the withholding of future estimated payments by the Department.

**M. Non-discrimination.** The Contractor shall not use the requirements of these specifications to discriminate against any qualified company or group of companies.

**N. Reporting Violations of Program Rules.** If the Contractor becomes aware of any violations of this Specification, the Contractor shall promptly report the violations to the Engineer.

### State Department of Transportation Contractor Report of Contract Payments

<b>Final Report</b> <input type="checkbox"/> Yes <input type="checkbox"/> No	<b>Contract Number</b>	<b>County</b>	<b>Report Date</b>
<b>Contractor Name and Address</b>		<b>Subcontractor/Vendor Name and Address</b>  <input type="checkbox"/> Check if Firm is CERTIFIED D/M/WBE	
<b>Contractor Federal Identification Number</b>		<b>Subcontractor/Vendor Federal Identification Number</b>	
<b>Total Payments Due to Date:</b> <b>- Retainage or Other Withholding to Date:</b> <hr style="width: 80%; margin: 0 auto;"/> <b>Total Payments to Date:</b>			
<b>Comments:</b>			
<b>Certification</b> <small>Section 139-f of the State Finance Law requires the Contractor to pay each of its subcontractors and/or materialmen the proceeds from the payment representing the value of work performed and/or materials furnished by the subcontractor and/or materialmen within 15 calendar days of the receipt of any payment from the public owner.</small>			
As an officer of the Contractor identified above, and based on my personal knowledge, I certify that payment has been made by the Contractor to the Subcontractor/Vendor in the amount stated herein pursuant to the last AAP HC-89 on file with the Department and that said work/ services/ product was performed/supplied by said Subcontractor/Vendor and that there were no rebates, refunds, or offsets applied to any payments except as noted under "Comments" above and a copy of this form has been sent to the Subcontractor/Vendor.		<b>FINAL PAYMENT CERTIFICATION</b> As an officer of the Subcontractor/Vendor identified above, and based on my personal knowledge, I certify that payment has been received in the amount stated herein pursuant to the last AAP HC-89 on file and that said work/ services/ product was performed/supplied and supervised solely by the Subcontractor/Vendor and that there were no rebates, refunds, or offsets applied to any payments except as noted under "Comments" above.	
Signed: _____  Title: _____  <div style="text-align: center;">(For Contractor)</div>		Signed: _____  Title: _____  <div style="text-align: center;">(For Subcontractor/Vendor)</div>	
<b>Notarization for Final AAP-21c</b>			
Sworn to me this _____  day of _____  <div style="text-align: center;">_____ Notary Public</div>		Sworn to me this _____  day of _____  <div style="text-align: center;">_____ Notary Public</div>	
<small>If this report is verified by an oath administered by a Notary Public in a foreign country other than Canada, it must be accompanied by a certificate authenticating the authority of the Notary who administered the oath.</small>			
<small>Any person who makes a false or fraudulent statement in connection with participation of a DBE on any assisted program or otherwise violates applicable State and/or Federal statutes may be referred for prosecution under applicable State and/or Federal law.</small>			
<small>Note to Subcontractor: If the Contractor has not paid your firm for work completed and accepted by the Department in accordance with the terms specified on this form, please contact the Engineer for the contract.</small>			

## AAP21c Form Instructions:

**Subcontractor/Vendor:** Is defined as any subcontractor, materialmen, supplier or service provider with an AAPHC-89 on file for the contract.

**Final Report:** Check YES or NO, as appropriate, to indicate whether this will be the Final Report submitted for this Subcontractor/Vendor.

**Contract No:** Enter New York State contract number. (Example D257126)

**County:** Enter the name of county or counties this contract is located in. (Example: Albany)

**Report Date:** Enter date (Month/Day/Year) through which payments due and made are reflective of.

**Contractor and Subcontractor/Vendor Data:** Enter names, and addresses (including zip code), telephone numbers (including area codes) and Federal Identification Numbers for both the Contractor and Subcontractor/Vendor.

**Total Payments Due to Date:** Enter total of all invoices received to date for the supply of material or work completed or services performed by the Subcontractor/Vendor.

**Retainage or Other Withholding to Date:** Enter amount due Subcontractor/Vendor that has not been paid due to retainage or other withholding.

**Total Payments to Date:** Value of payments due to date less retainage or other withholding.

**Comments:** Amounts recorded as retainage or other withholding must be accompanied by a brief description of the circumstances necessitating the withholding along with item numbers involved (if any).

**Signatures:** An authorized representative of the Contractor must sign and date.

**Signatures on Final Report:** An authorized representative of both the Contractor and Subcontractor/Vendor sign and date.

**Notarization:** On the Final Report, or when directed by the Department, Contractor and Subcontractor/Vendor signatures must be notarized.

The AAP-21c is a cumulative to-date report of the total payments due a Subcontractor/Vendor, total retainage or other withholdings, and the total payments made to the Subcontractor/Vendor. The AAP-21c is to be submitted by the fifteenth day of the month to the Engineer, or when requested by the Department. The dollar values on this report should be accurate through the last day of the previous month. The Final AAP-21c should be submitted as soon as possible after the Subcontractor/Vendor has completed/supplied all of the work/services/products for which it was utilized, but not later than 60 days after the Subcontractor/Vendor has completed its commitment. This form is required as part of the contract documentation and shall be submitted with the Final Agreement and Estimate Package.

An AAP-21c is required for each Subcontractor/Vendor due payment on the contract for which there is an AAPHC 89 on file with the Department.

The Contractor shall submit the AAP-21c, signed by an authorized representative of the firm, to the Engineer and a copy to each Subcontractor/Vendor due payment on the contract.

The Contractor's portion of the Certification section of the Final AAP-21c must be completed and notarized.

The Contractor shall inform the Subcontractor/Vendor of its responsibility to review the form for accuracy and to have the Subcontractor/Vendor's signature on the Final AAP-21c notarized.

This report is a written instrument within the meaning of Section 175.00 of the Penal Law. I am fully aware that it will be filed with the New York State Department of Transportation and become a part of the records thereof and that entering any false information hereon constitutes the crime of Offering a False Instrument for Filing in the first degree, which is a Class E Felony. (Penal Law, Section 175.35)

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