

Schedule C

ESD NON-DISCRIMINATION AND AFFIRMATIVE ACTION CONSULTANT CONTRACT PROVISIONS

I. Policy

It is the policy of the State of New York and ESD, to comply with all federal, State and local law, policy, orders, rules and regulations which prohibit unlawful discrimination because of race, creed, color, national origin, sex, sexual orientation, age, disability or marital status, and to take affirmative action to ensure that Minority and Women-owned Business Enterprises (M/WBEs), Minority Group Members and women share in the economic opportunities generated by ESD's participation in projects or initiatives, and/or the use of ESD funds.

- 1) The Contracting Party represents that its equal employment opportunity policy statement incorporates, at a minimum, the policies and practices set forth below:
 - (a) Contracting Party shall (i) not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, sexual orientation, age, disability or marital status, (ii) undertake or continue existing programs of affirmative action to insure that Minority Group Members and women are afforded equal employment opportunities without discrimination, and (iii) make and document its conscientious and active efforts to employ and utilize Minority Group Members and women in its workforce on Contracts. Such action shall be taken with reference to, but not limited to, recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.
 - (b) At the request of the AAO, the Contracting Party shall request each employment agency, labor union, or authorized representative of workers with whom it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative does not unlawfully discriminate, and that such union or representative will affirmatively cooperate in the implementation of the Contracting Party's obligations herein.
- (2) Upon commencement of the contract services and quarterly thereafter during the term of the Contract, the Contracting Party shall submit to the AAO a Workforce Employment Utilization Report (Schedule A-1) of the workforce actually utilized on the Contract, itemized by ethnic background, gender, and Federal Occupational Categories or other appropriate categories specified by the AAO. In the case where the Contracting Party's and/or subcontractor's workforce does not change within the quarterly period, the Contracting Party shall so notify the AAO in writing.
- (3) The Contracting Party shall also include with the first Workforce Employment Utilization Report and as part of the documentation required for final payment, such data describing: a) the total number of company employees at commencement of contract services, b) the total number of company employees at completion of contract services and c) any net increases in the number of employees in the company. Net increases in employment shall be further classified by ethnicity, gender and occupational code.

The Contracting Party shall include, or cause to be included, the provisions of clauses (1) through (3) in every Contract or purchase order that it enters into in order to fulfill its obligations under the Contract, in such a manner that such provisions will be binding upon each and every Contracting Party with respect to any Contract or Subcontract.

II. Goals for Minority and Women-Owned Business Enterprise Participation

- (a) The Contracting Party is required to use its best efforts to achieve an overall M/WBE participation goal of 20% of the total dollar value of the Contract.

- (b) The goal for M/WBE participation in the performance of the work is expressed as a percentage of the contract price.
- (c) The total dollar value of the work performed by M/WBEs will be determined as: (i) the dollar value of the work subcontracted to M/WBEs; (ii) where the Contracting Party is a joint venture, association, partnership or other similar entity including one or more M/WBEs -- the contract price multiplied by the percentage of the entity's profits/losses which are to accrue to the M/WBE(s) under the Contracting Party's agreement; or (iii) where the M/WBE is the Contracting Party -- the contract price.
- (d) The Contracting Party shall include, or cause to be included, the provisions of clauses (a) through (c) in every Contract or purchase order that it enters into in order to fulfill its obligations under the Contract, in such a manner that such provisions will be binding upon each and every Contracting Party with respect to any Contract or Subcontract.

III. Reporting Requirements

The Contracting Party will permit access to its books, records and accounts, with respect to the Contract, by the AAO for purposes of investigation to ascertain compliance with the provisions herein. Upon request, the Contracting Party shall periodically file, or cause to be filed, reports, substantially in the format attached hereto as Schedule A-1 and A-2 (MBE/WBE Compliance Report to be filed quarterly), with the AAO detailing compliance with the provisions of these non-discrimination and affirmative action clauses. Accuracy of the information contained in the reporting an owner or officer of the Contracting Party shall certify to documentation.

IV. Non-Compliance and Sanctions

In the event that any Contracting Party violates any of the provisions herein, the ESD may require that the following sanctions and remedies for non-compliance be imposed:

- (a) Summon the Contracting Party for a hearing with the AAO.
- (b) After any such hearing, and a determination by the AAO that the Contracting Party has failed to comply with any of these provisions, and the passage of time in which to remedy such failure has transpired, this Contract may be canceled, terminated or suspended, in whole or in part. Alternatively, the AAO, in his/her sole discretion, may assess liquidated damages against the Contracting Party for failure to demonstrate its best efforts in complying with the affirmative action program. Liquidated damages may be assessed in an amount equal to the dollar value of Contracts that would have been realized by M/WBEs if the goals had been achieved.
- (c) If such an award is assessed against any Contracting Party, (i) the amount of such assessment may be withheld from any monies due to the Contracting Party by the ESD or; (ii) may be paid to the ESD by the Contracting Party that has been found to fail to comply with the affirmative action program. Any liquidated damages collected hereunder shall be paid into one or more M/WBE technical assistance funds administered by the ESD.
- (d) Such sanctions that may be imposed and remedies invoked hereunder, shall be considered independent of, or in addition to, sanctions and remedies otherwise provided by law.

ESD NON-DISCRIMINATION AND AFFIRMATIVE ACTION DEFINITIONS

Affirmative Action

Shall mean the actions to be undertaken by the Borrower, Grantee and any Contracting Party in connection with any project or initiative to ensure non-discrimination and Minority/Women-owned Business Enterprise and minority/female workforce participation, as set forth in Sections II herein, and developed by ESD.

Affirmative Action Officer (“AAO”)

Shall mean ESD’s Affirmative Action Officer or his/her designee, managing the affirmative action program for ESD.

Best Efforts - Minority and Women-owned Business Enterprise Participation

Best efforts are not limited to the efforts specified herein, and the role of M/WBE firms are not restricted to that of a subcontractor/subconsultant. Where applicable, M/WBE firms should be considered for roles as prime contractors. Such best efforts shall include at least the following:

- (a) Dividing the contract work into smaller portions in such a manner as to permit subcontracting to the extent that it is economically and technically feasible to do so;
- (b) Actively and affirmatively soliciting bids from qualified M/WBEs, including circulation of solicitations to minority and women's trade associations. Each Contracting Party shall maintain records detailing the efforts made to provide for meaningful M/WBE participation in the work. Such record keeping must include the names and addresses of all M/WBEs contacted and, if an M/WBE is the low bidder and is not selected for such work or portion thereof, the reasons for such decision;
- (c) Making plans and specifications for prospective work available to M/WBEs in sufficient time for review;
- (d) Utilizing the services and cooperating with those organizations providing technical assistance to the Contracting Party in connection with potential M/WBE participation on the Contract;
- (e) Utilizing the resources of the AAO to identify New York State certified M/WBE firms for the purpose of soliciting bids and subcontracts; and
- (f) Encouraging the formation of joint ventures, associations, partnerships, or other similar entities, where appropriate, to ensure that the Contracting Party will meet its obligations herein.
- (g) The Contracting Party shall remit payment in a timely fashion.

Contract

Shall mean (i) a written agreement or purchase order instrument, or amendment thereto, executed by or on behalf of a **Contracting Party**, providing for a total expenditure in excess of \$5,000 for labor, services, supplies, equipment, materials or any combination of the foregoing funded in whole or in part with ESD funds and (ii) any loan or grant agreement funded in whole or in part with ESD funds.

Contracting Party

Shall mean (i) any contractor, subcontractor, consultant, subconsultant or vendor supplying goods or services, pursuant to a contract or purchase order in excess of \$1,500, in connection with any projects or initiatives funded in whole or in part by the ESD and (ii) **any borrower or grantee** receiving funds from the ESD pursuant to a loan or grant document.

Minority Business Enterprise (“MBE”)

Shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent (51%) owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) 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 enterprise; (iv) an enterprise authorized to do business in the State of New York and is independently owned and operated; and (v) an enterprise certified by New York State as a minority business.

Minority Group Member

Shall mean a United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups: (i) Black persons having origins in any of the Black African racial groups; (ii) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race; (iii) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands; and (iv) Native American or Alaskan native persons having origins in any of the original peoples of North America.

Subcontract

Shall mean an agreement providing for a total expenditure in excess of \$1,500 between a **Contracting Party** and any individual or business enterprise, for goods or services rendered in connection with any project or initiative funded in whole or in part with ESD funds.

Women-owned Business Enterprise (“WBE”)

Shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent (51%) owned by one or more citizens or permanent resident 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 the State of New York and is independently owned and operated; and (v) an enterprise certified by New York State as woman-owned.

SCHEDULE A-2

MBE/WBE COMPLIANCE REPORT
NON-CONSTRUCTION

(to be filed quarterly)

PROJECT SPONSOR/DEVELOPER: _____

ESD AA REPRESENTATIVE: _____

ADDRESS: _____

PROJECT NAME: _____

TELEPHONE: _____

PROJECT START DATE: _____

CONTACT PERSON: _____

TOTAL NUMBER OF SUBCONTRACTORS: _____

Attach M/WBE contract documentation, i.e. executed contracts, signed contracts, etc.

TOTAL DOLLAR AMOUNT OF SUBCONTRACTS: _____

This report should be completed by an officer of the reporting company or an AA Representative with the appropriate documentation.

| PRIME CONTRACTOR (Name, Address, Contact Person and Phone) | TYPE OF CONTRACT (Trade/Service) | CONTRACT AMOUNT | M/WBE SUBCONTRACT DATE | MBE/WBE SUBCONSULTANT (Name, Address, Contact Person and Phone) |
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CERTIFICATION:

I, _____ (Print Name), the _____
 I have read this Compliance Report and (ii) to the best of my knowledge, information and belief the information contained herein is complete and accurate.

SIGNATURE _____ DATE _____

Forward to:

Empire State Development
Affirmative Action Unit - Laverne Poole
633 Third Avenue

New York, NY 10017-6754 Office: (212) 803-3224

Fax: (212) 803-3223