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Sent: Wednesday, March 29, 2023 12:09:00 PM (UTC-05:00) Eastern Time (US & Canada)
To: DEP RulePetitions [DEP] <rulepetitions@dep.nj.gov>
Subject: [EXTERNAL] Petition for Rule Making

This letter petition is filed via email pursuant to N.J.S.A. 52:14B-4 (NJ APA), which provides that: “(f) An interested person may petition an agency to adopt a new rule, or amend or repeal any existing rule. Each agency shall prescribe by rule the form for the petition and the procedure for the submission, consideration and disposition of the petition. The petition shall state clearly and concisely: (1) The substance or nature of the rule-making which is requested; (2) The reasons for the request and the petitioner's interest in the request; (3) References to the authority of the agency to take the requested action.” This petition for rulemaking is submitted in accordance with the NJ APA and in substantial compliance with NJAC 7:1D-1 PETITIONS FOR RULES, and applicable Pinelands NJAC 7:50-7.3 Proposed amendments; petitions for amendment. I hereby jointly petition the Department, the Pinelands Commission, and the Highlands Council for rulemaking as follows:.

1. The substance or nature of the rule-making which is requested;
I have attached a word document with tracked changes of the entire administrative code

- (2) The reasons for the request and the petitioner's interest in the request;

I am requesting the rule-making or amendment of the administrative code for the purposes of aiding the function, purpose and enforcement of the use of “Awarding Contracts for State Assisted Projects to Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals”. I feel that in practice the administrative rules as applied create a burden to an understaffed and under resourced office within the NJ DEP, and therefore hinder the purpose of the rules concerning inclusion of SED firms. The current process creates an unlevel playing field for SED contractors, and does not encourage SED participation in a meaningful manner. Only contractors who are aware of the paperwork burden are able to compete and subcontractors are intimidated in the applicability of the rules. In having the Office create a SED template and approve an agency's plan an agency can then market the plan to contracting groups and business associations like the NJ Hispanic Chamber, NJ African American Chamber, UTCA and more. The consistency brought out in the process will make the process transparent and effective.

2. References to the authority of the agency to take the requested action.

The authority lies in the ability for rule making. The Department should be looking at the effectiveness of their programs and determining if there is a better way.

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DEP NOTE: Petitioner's submitted rule text has been edited to remove material that may be protected by copyright. Petitioner's proposed changes to the rules are shown in red, and Petitioner's comment is in the right margin, as submitted.

7:22-9.2 Definitions

The following words and terms, as used in this subchapter, will have the following meanings unless the content clearly indicates otherwise.

“Building” means the acquisition, erection, alteration, remodeling, improvement or extension of an environmental infrastructure facility.

“Construction” includes, but is not limited to:

1. The preliminary planning to determine the economic and engineering feasibility of environmental infrastructure facilities, the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, design, plans, working drawings, specifications, procedures, and other action necessary for the construction of environmental infrastructure facilities;
2. The building of, or purchase of land for, environmental infrastructure facilities; and
3. The inspection and supervision of the building of environmental infrastructure facilities.

“Contract” means any written agreement with a professional service or construction contractor related to the construction of an environmental infrastructure project.

“Contracting agency” means:

1. The governing body of a local government unit or any department, branch, board, commission, committee, authority, agency or officer of such local government unit possessing the authority to award and make contracts; or
2. The owner(s) or authorized representative(s) of a private entity.

“Contractor” means any party entering into a contract to provide or offering to provide building, materials and equipment, or services to a project sponsor for the construction of environmental infrastructure facilities. This includes, but is not limited to, planning and design, as well as building related services such as engineering, inspection and accounting.

“Contractor’s plan” means the SED utilization plan submitted by the contractor to the project sponsor and to the Department establishing subcontracting opportunities that will fulfill the requirements of this subchapter.

“Department” means the New Jersey Department of Environmental Protection and its successors and assigns.

“Environmental infrastructure facilities” means wastewater treatment facilities, stormwater management facilities or water supply facilities.

“Financial agreement” means the legal instrument, including a grant agreement or loan agreement, executed between either the State of New Jersey or the Trust and the project sponsor for the construction of environmental infrastructure facilities.

“Local government unit” means a county, municipality, municipal or county sewerage or utility authority, municipal sewerage district, joint meeting, improvement authority or other political subdivision of the State authorized to construct, operate and maintain wastewater treatment or stormwater management facilities, or a State authority, district water supply commission, county, municipality, municipal or county utilities authority, municipal water district, joint meeting or any other political subdivision of the State authorized pursuant to law to operate or maintain a public water supply system or to construct, rehabilitate, operate or maintain water supply facilities or otherwise provide water for human consumption.

“New Jersey environmental infrastructure financing program” means the program for providing financing to project sponsors pursuant to N.J.A.C. 7:22–3, 4 and 6, and 7:22A–6 and 7.

“Office” means the Office of Equal Opportunity and Public Contract Assistance or other program of the Department of Environmental Protection with the responsibility for administration of this subchapter.

“Private entity” means the owner(s) of a nongovernmental community water system or a nonprofit noncommunity water system.

“Project” means the defined services for the construction of specified operable environmental

infrastructure facilities as approved by the Department or the Trust in the project sponsor's financial agreement.

"Project compliance officer" means an officer or employee of the project sponsor who is designated by the project sponsor to monitor and enforce compliance with the affirmative action and SED requirements of the applicable program rules and this subchapter.

"Project plan sheet" means the ~~proposal project information sheet~~ submitted at the time of application by the project sponsor to the Department ~~establishing~~ supplementing the SED utilization plan and its requirements.

"Project sponsor" means any local government unit or private entity that seeks a loan or grant pursuant to N.J.A.C. 7:22-3, 4 and 6 and 7:22A-6 and 7.

"SED utilization plan" means a written document outlining the ~~entire project work~~ project sponsor's goals for participation, ~~the estimated length of time it will take to complete the project~~, each significant ~~segment known or anticipated future project of the project~~ on which SEDs will or may participate, and a description of how SEDs will be contacted.

"Socially and economically disadvantaged small business concern" or "SED" means any small business concern:

1. Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; or, in the case of a joint venture, at least 51 percent of the beneficial ownership interests are legitimately held by a SED; and
2. Whose management and daily business operations are controlled by one or more socially and economically disadvantaged individuals; and
3. Which is a full participation subcontractor in that the SED is responsible for the execution of a distinct element of work and carries out the work responsibility by actually performing, managing and supervising the task involved. Any deviation from this definition will automatically classify

Commented [RG1]: The purposes is to shift away from a project by project plan and to have a Utilization plan approved by sponsoring agency. A simplified project worksheet may be used to supplement the individual plan, but the entire plan does not need to be reinvented or reconstructed each time. This simple change would allow for more inclusivity in consistency review and standardization. Making firms more familiar with the opportunities and possibilities.

the SED as a broker, middleman or passive conduit. These three functions are contrary to the spirit of the Trust Act and will not qualify a SED enterprise for State of New Jersey certification; and

4. Which has been certified pursuant to the New Jersey Uniform Certification Act (N.J.S.A. 52:27H-1 et seq.) or pursuant to the provisions of 49 CFR Part 23 by the New Jersey Commerce and Economic Growth Commission, the New Jersey Department of Transportation, the Port Authority of New York and New Jersey, the New Jersey Transit or other agencies deemed appropriate by the Office, as an eligible minority business or female business.

i. "Socially disadvantaged individuals" means those individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

ii. "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

iii. "Socially and economically disadvantaged individuals" shall include women, Black Americans, Hispanic Americans, Native Americans, Asian Americans, and members of other groups, or other individuals, found to be socially and economically disadvantaged by the Small Business Administration under Section 8(a) of the Small Business Act, as amended (15 USC 637(a)). Black Americans, Hispanic Americans, Native Americans and Asian Americans shall be defined as follows:

(1) "Black American" means a person having origins in any of the black racial groups in Africa;

(2) "Hispanic American" means a person of Spanish or Portuguese culture, with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;

(3) "Asian American" means a person having origins in any of the original peoples of the Far East, Southeast Asia, Indian Subcontinent, Hawaii, or the Pacific Islands;

(4) “Native American” means a person having origins in any of the original peoples of North America.

“Small business concern” means a business which is independently owned and operated and which is not dominant in its field of operation. A business is independently owned and operated if the management which controls the business is responsible for both its daily and long term operations.

“Subcontract” means an agreement to perform a portion of a contract.

“Subcontractor” means a third party that is engaged by the contractor to perform part of the work under a subcontract.

“10 percent SED utilization,” “10 percent goal” and “10 percent” means SED business concern participation, which includes seven percent for minority-owned SED business concerns and three percent for women-owned SED business concerns.

“Template SED Utilization Plan,” shall mean a document issued by the SED office which shall contain all of the required and necessary clauses, forms, and references for inclusion in a sponsor’s SED Utilization Plan.

“Trust” means the New Jersey Infrastructure Bank established pursuant to the Trust Act.

“Trust Act” means the New Jersey Infrastructure Trust Act, N.J.S.A. 58:11B-1 et seq.

7:22–9.3 SED utilization requirements for projects

(a) A goal of not less than 10 percent (or a higher percentage as may be required by Federal law) of the total amount of all contracts for building, materials and equipment, or services for a project funded by a New Jersey environmental infrastructure facilities financing program must be awarded to SEDs.

(b) The 10 percent SED utilization requirement shall be accomplished by the following:

1. Bids shall be solicited on an unrestricted basis. The bid documents, however, shall include a statement to the effect that the successful bidder must fulfill the SED utilization requirements by subcontracting portions or the work to SEDs; or
2. Contractors also have the option of establishing unrestricted bidding procedures to fulfill the 10 percent SED utilization requirement for the project.

(C) The SED office shall provide accessible on their website a “Template SED Utilization Plan”, which shall contain all the necessary elements for inclusion in a Sponsor’s SED Utilization Plan. The Template shall be periodically updated and maintained by the SED office.

7:22–9.4 Requirement to develop SED Utilization Plan

(a) Each project sponsor shall develop, in consultation with the Office, a SED Utilization plan for achieving its SED utilization requirements. ~~(the The “project plan sheet” shall supplement the SED utilization plan with project specific details.)~~. Development of a plan shall be completed before the Department and, when relevant, the Trust may approve an application pursuant to the applicable program rules.

(b) The project plan sheet shall identify those contracts proposed to be bid on an unrestricted basis. For each unrestricted contract, the project plan shall also identify the SED utilization requirements that the successful bidder shall meet.

(c) All contractors, including SED contractors, shall ~~submit their own~~affirm compliance with the Sponsoring agency’s SED utilization plan ~~(“contractor’s plan”), for the aspects of the project covered by the contract, to the project sponsor and~~ to the Office within 30 days of the awarding of a contract. The Contractor’s ~~Plan shall contain provisions~~make a reasonable effort to meet the specific SED utilization requirements imposed upon the contractor by the project sponsor as well as to meet the general SED utilization requirements for the project pursuant to this subchapter.

(d) If the contractor does not comply with the requirements of the contractor’s plan and the project sponsor does not take steps to otherwise comply with N.J.A.C. 7:22–9.3(a), the Department and, in the case of a Trust loan, the Trust, may take any of the actions or combinations thereof specified in N.J.A.C. 7:22–3.40 through 3.44, 7:22–4.40 through 4.44, 7:22–6.40 through 6.44 and 7:22A–1.8 through 1.13.

7:22–9.12 Reports

- (a) The contracting agency shall submit its planning and design SED utilization report to the Office at the time of filing of its grant/loan application.
- (b) Each project compliance officer shall submit the contracting agency's monthly progress reports to the Office. Once all SED contractors have been obtained, submittal of this report will no longer be required.
- (c) Each project compliance officer shall submit a periodic report on behalf of the project sponsor to the Office according to a schedule announced by the Office. At a minimum, this construction report shall be submitted quarterly; that is, January, April, July and October. Where appropriate, the Office may approve a variation in the frequency of reporting requirements specified in (b) through (d) of this section. This report shall include the following information:
1. The value of each contract and subcontract awarded to SEDs and the total dollar value and number of contracts and subcontracts awarded to SEDs;
 2. The percentage of SED utilization in comparison to the cost of each contract, as well as the total percentage of SED utilization (including set aside contracts) in comparison to overall project costs;
 3. The types and sizes of the participating SEDs and the nature of goods and services being provided; and
 4. The efforts made to publicize and promote the project sponsor's SED utilization plan.
- (d) Contractors shall submit a quarterly construction report to the project sponsor and to the Office. The project compliance officer may be contacted for assistance if needed.
- (e) The report forms required by (a) through (d) above shall be obtained from the Office.
- (f) The project compliance officer shall submit reports or information in addition to what is required by (a) through (c) above when requested to do so by the Office.
- (g) Failure to comply with the reporting requirements of (a) through (d) and (f) above may subject the project sponsor to the remedies for noncompliance with State and Trust loan or grant conditions specified in the applicable program rules.
- (h) the Office shall populate a list of SED contractors and sub-contractors by project sponsors which shall be updated periodically.

