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## **PUBLIC NOTICE**

### **ENVIRONMENTAL PROTECTION**

### **NEW JERSEY INFRASTRUCTURE BANK**

#### **Notice of Action on Petition for Rulemaking**

#### **Notice of Action on Petition to Amend Rules Related to Awarding Contracts for State Assisted Projects to Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals**

**N.J.A.C. 7:22-9**

Petitioner: Gerald T. Reiner, Jr., Bergen County Utilities Authority.

**Take notice** that the Department of Environmental Protection (Department), has denied the petition for rulemaking described below as filed by Gerald T. Reiner, Jr., on behalf of the Bergen County Utilities Authority (petitioner). The Department received the petition on March 29, 2023, and published notice of receipt of the petition in the May 15, 2023, New Jersey Register (55 N.J.R. 1040(b)). As stated in the notice of receipt, the Department acknowledged the petition only to the extent it requests action within the Department's jurisdiction. The Department cannot and did not acknowledge the petition on behalf of the Pinelands Commission or the Highlands Water Protection and Planning Council to which the petition was also directed, nor does the Department address requests made of the Pinelands Commission or the Highlands Water Protection and Planning Council.

#### **The Petition**

*Requests of Pinelands Commission and Highlands Council*

In addition to the Department, the petitioner also petitions the Pinelands Commission and the Highlands Water Protection and Planning Council and references the Pinelands Commission's rules at N.J.A.C. 7:50-7.3. The Pinelands Protection Act gives the Pinelands Commission the sole authority to amend the Pinelands Comprehensive Management Plan. N.J.S.A. 13:18A-6. Similarly, the Highlands Water Protection and Planning Act gives the Highlands Council sole authority to prepare, adopt, and amend the Highlands Regional Master Plan (in consultation with the Department and other State agencies), and to promulgate rules to exercise its powers and perform its duties and responsibilities. N.J.S.A. 13:20-6, 8, and 9. Accordingly, the Department does not acknowledge or respond to the petition insofar as it requests amendments to the Pinelands Comprehensive Management Plan and the Highlands Regional Master Plan or other actions that are beyond the Department's sole authority.

*Requests of the Department*

The petitioner seeks to have the Department's Office of Equal Opportunity and Public Contract Assistance ("Office," as defined at N.J.A.C. 7:22-9.2) create a template for the socially and economically (SED) disadvantaged small business concerns utilization plan that N.J.A.C. 7:22-9.4 requires each project sponsor to prepare. The suggested template would contain all the necessary elements that a project sponsor must include in the SED utilization plan. Then, according to the petitioner, the project sponsor can market the plan to contracting groups and business associations like the New Jersey Hispanic Chamber, New Jersey African American Chamber, Utility and Transportation Contractor's Association, and more. This proposed template will, according to the petitioner, make the process transparent and effective. The petitioner also seeks to require the Office to prepare and maintain a list of SED contractors and subcontractors.

Although not stated in the petitioner’s summary, in the petitioner’s appended amendments to N.J.A.C. 7:22-9, the petitioner seeks to require each project sponsor to prepare a non-project-specific standing SED utilization plan using the proposed template. The petitioner further seeks to require project sponsors to draft a “project plan sheet,” which would be project specific and supplement the standing SED utilization plan. To this end, the petitioner states that the purpose is to shift away from a project-by-project plan and to instead have a single utilization plan (standing SED utilization plan) that the project sponsor has approved in advance. The petitioner suggests that a simplified project worksheet (the project plan sheet) could supplement the standing SED utilization plan, but the project sponsor would not need to reinvent or reconstruct the SED utilization plan each time the project sponsor puts a project out for bid. Additionally, the petitioner seeks to repeal the requirement that a contractor submit its own SED utilization plan (also referred to as a “contractor’s plan”) and instead require each contractor to affirm compliance with the project sponsor’s SED utilization plan (consisting of the standing SED utilization plan and the project plan sheet) and “make a reasonable effort” to meet the conditions of that plan.

The petitioner states that the purpose of the requested amendments is to aid “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 [(SEDs)].” According to the petitioner, “in practice the administrative rules as applied create a burden to an understaffed and under resourced office within the [Department], 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.”

## **Background**

The New Jersey Infrastructure Trust Act, N.J.S.A. 58:11B-1 et seq. (Infrastructure Trust Act), was adopted in 1985 to improve the State's water resources through the funding of environmental and transportation infrastructure projects. N.J.S.A. 58:11B-2. The Infrastructure Trust Act requires, among other things, the New Jersey Infrastructure Bank (I-Bank) to establish procedures for providing opportunities to SED firms to participate in State financed environmental infrastructure construction projects. N.J.S.A. 58:11B-26. Accordingly, the I-Bank, together with the Department, promulgated the requirements at N.J.A.C. 7:22-9 for awarding contracts for State-assisted projects to small business concerns owned and controlled by socially and economically disadvantaged individuals (SED Rules). The purpose of the SED Rules is to implement the purposes and objectives of the Infrastructure Trust Act, as well as the requirement expressed in the New Jersey Wastewater Treatment Fund rules, N.J.A.C. 7:22-3.17(a)24, New Jersey I-Bank rules, N.J.A.C. 7:22-4.17(a)24, and the Pinelands Infrastructure Trust Fund rules, N.J.A.C. 7:22-6.17(a)24, that recipients of financing from the Department and I-Bank for environmental infrastructure projects shall make a "good faith effort" to award not less than 10 percent of all contracts to SED firms.

The principal provision of the SED Rules, N.J.A.C. 7:22-9.3(a), requires that a goal of not less than 10 percent of all construction contracts for environmental infrastructure projects must be awarded to SEDs. The procurement process, set forth at N.J.A.C. 7:22-9.3(b), is the mechanism for ensuring that financing applicants meet the SED utilization requirement. Specifically, the SED Rules establish procedures for providing opportunities for SED contractors and vendors to supply materials and services under contracts for construction of certain environmental infrastructure projects financed through the I-Bank and the Department. The SED Rules establish the

requirements that recipients of financial assistance for environmental infrastructure projects must follow in establishing programs to encourage participation by SED firms. Among other things, the SED Rules specify the criteria a contractor and vendor must meet in order to qualify as an SED firm, set minimum utilization goals, establish notice and advertisement requirements, and set standards and procedures for funding recipients to follow when they award and make contracts for the environmental infrastructure project.

Relevant to this petition, the SED Rules require that both the project sponsor and contractor draft an “SED Utilization Plan,” defined as “a written document outlining the entire project work, the estimated length of time it will take to complete the project, each significant segment of the project on which SEDs will or may participate, and a description of how SEDs will be contacted.” N.J.A.C. 7:22-9.2 and 9.4.

The SED Rules identify two types of SED utilization plans: a “project plan” and a “contractor’s plan.” N.J.A.C. 7:22-9.2 and 9.4. In addition to the requirements of the general SED Utilization Plan, the project plan must also outline the project sponsor’s plan for achieving its SED utilization requirements. N.J.A.C. 7:22-9.4(b). The contractor’s plan must contain provisions to meet the specific SED utilization requirements that the project sponsor identifies in the project plan, as well as the general SED Utilization Plan requirements. N.J.A.C. 7:22-9.4(c).

The project sponsor drafts and submits the project plan to the Department at the time the project sponsor applies for project funding. N.J.A.C. 7:22-9.4(a). The Department then reviews the application, including the project plan and bid schedule. If the Department approves the application, funds are disbursed, and the procurement process may begin. If the Department finds deficiencies with the application, the Department works with the project sponsor to correct the application.

After the Department approves the application, the project sponsor may begin the procurement process; the successful bidder will then fulfill the SED utilization requirements. N.J.A.C. 7:22-9.3(b). To meet the requirements, the project sponsor may solicit bids on an unrestricted basis, meaning bids would be accepted from any contractor, notwithstanding the contractor's SED status. However, the bid solicitation documents must state that the successful bidder must fulfill the SED utilization requirements by subcontracting to SED firms. The contractor may then establish unrestricted procurement procedures to fulfill the SED utilization requirements.

The successful bidder, who has been awarded the contract for the project, drafts the contractor's plan and submits it to the project sponsor and the Department. The successful bidder must submit the contractor's plan to the project sponsor and Department within 30 days after being awarded the contract. The Department reviews the contractor's plan to ensure compliance with SED utilization requirements. If found non-compliant, the contractor's plan must be resubmitted or the project may be found non-compliant, at which point funding becomes at risk.

### **The Department's Response to the Petition**

After careful consideration, the Department has determined to deny the petitioner's requests. The Department acknowledges the petitioner's stated intentions to increase efficiency in processing contracts and to encourage greater SED firm inclusivity. However, the existing rules sufficiently implement and accomplish their aims; the petitioner's proposed amendments will not, for the reasons described below, assist in this regard.

#### *The Project Plan*

The petitioner requests that the Department amend the project sponsor's SED utilization plan (the project plan) to make the single document applicable to multiple projects. The project

sponsor would draft a document that is not project specific, but that outlines the project sponsor's general "goals for participation" and identifies "known or anticipated future project[s]" on which SED firms will or may participate. To account for project-specific SED utilization details, the petitioner proposes the Department require the project sponsor to prepare a second document -- a "project plan sheet."

Pursuant to the existing SED Rules at N.J.A.C. 7:22-9.4, the project plan is project-specific and requires the project sponsor to harmonize project-specific details with the SED utilization requirements. The project sponsor must submit, to the Department, a unique project plan with each funding application. Submitting the project plan at the early funding stage requires the project sponsor to consider SED utilization requirements and how to meet those requirements before the project is finalized. This also allows the Department to ensure compliance at an early stage while project details are still adaptable. The project sponsor must consider SED utilization requirements in the context of a specific project.

The petitioner's stated intent in requiring the project sponsor to prepare a standing SED utilization plan is to provide consistency and enable project sponsors to "market" the plan to SED firms. Except for bid advertisement requirements at N.J.A.C. 7:22-9.7, the existing rules leave to project sponsors and contractors the responsibility to implement and achieve the requirements of the SED Rules, including marketing the project to potential contractors, within the bounds of the rules. The rules recognize that each project is unique; therefore, how the project sponsor markets the project, and how the contractor implements the SED requirements is also unique to the specific project. The individualized nature of the needs and goals of each project make the requested amendments inappropriate.

The suggested standing SED utilization plan and project plan sheet would create an unnecessary burden upon and duplication of efforts by both the project sponsor and the Department. To ensure that each project meets the SED utilization goals, all information specified in the existing SED Rules must be included in the SED utilization plan required by the Department. Pursuant to the existing rules, the Department reviews each SED utilization plan in the context of the project for which the project sponsor seeks funding to ensure that the project sponsor has sufficiently planned to meet SED utilization requirements. To provide the same assurance under the petitioner's requested amendments, a project sponsor would be required to submit for Department review a standing SED utilization plan and each change to the standing SED utilization plan, even if there is no pending application for funding. Then, when the project sponsor submits a funding application, it would have to submit for Department review the standing SED utilization plan then in effect, as well as the project plan sheet specific to the project.

Further, requiring a project sponsor to outline its plan for SED utilization in future projects in a standing document, without the benefit of project-specific facts, is impractical. Each project has its own scope of work, location, time, and cost. The variability of such factors is, among other reasons, why N.J.A.C. 7:22-9.3 allows for flexibility in fulfilling SED utilization requirements. A project-specific SED utilization submission ensures that project sponsors and contractors have a viable plan for correctly fulfilling their SED utilization requirements given the unique facts of any given project. The petitioner attempts to address project-specific matters through the project plan sheet; however, the project plan sheet would likely not be materially different from the existing project sponsor SED utilization plan and could create confusion to the extent that it provides program-specific information and attempts to tailor the standing SED utilization plan to the specific project.



Were the Department to amend the rules as the petitioner requests, the Department envisions that ultimately the project sponsor would prepare a standing SED utilization plan that does no more than recite as goals the SED utilization requirements of the rules. The project plan sheet would then contain the project-specific information that the existing rules require in the project plan.

The petitioner requests that the Department promulgate a “Template SED Utilization Plan” containing all the necessary elements of the project sponsor’s SED utilization plan. The Office already maintains such a document entitled, “Applicant Sponsor’s SED Utilization Plan Mandatory Items Checklist.” <https://www.nj.gov/dep/eo/forms.htm>. This document is a step-by-step guide to drafting a project sponsor’s SED utilization plan and includes sample language. As of the publication of this notice of action, the Department is in the process of updating the Applicant Sponsor’s SED Utilization Plan Mandatory Items Checklist but will repost it to the website when it completes the revisions. Additionally, the website contains a guide to assist project sponsors in drafting SED contracts.

The Office makes a similar document available to contractors and subcontractors to assist them in drafting the contractor’s SED utilization plan. As of the publication of this notice, the document is available on request; however, the Office is in the process of posting this document to its website.

#### *The Contractor’s Plan*

The petitioner requests that the Department eliminate the requirement that all contractors, including SED contractors, submit an SED utilization plan (the contractor’s plan). In its place, the petitioner proposes that contractors instead “affirm compliance” with the project sponsor’s SED utilization plan (consisting of the petitioner’s requested standing SED utilization plan and project

plan sheet) and “make a reasonable effort” to meet the SED requirements imposed by the project sponsor and the SED Rules.

In all events, the contractor, not the project sponsor, is responsible for implementing the SED utilization requirement set forth in the SED Rules. As discussed above, to fulfill the SED utilization requirement, the project sponsor may solicit bids on an unrestricted basis but must state in the bid solicitation documents that the successful bidder must fulfill the SED utilization requirements by subcontracting to SED firms. Then, the contractor may establish unrestricted procurement procedures to fulfill the SED utilization requirements. N.J.A.C. 7:22-9.3(b).

Insofar as the SED utilization requirements are fulfilled through contractors, as opposed to project sponsors, the contractor’s plan is an indispensable requirement. The contractor’s plan outlines how the contractor will meet the specific SED utilization requirements imposed by the project sponsor and the SED Rules. It not only requires contractors to develop a plan to meet the SED utilization requirements, but also allows both the project sponsor and the Department to ensure that the plan is viable, such that the contractor will meet SED utilization requirements. The contractor must put forth a “good faith effort” to meet the SED utilization requirements, or risk the withholding of project funds, issuance of an order suspending work, or other remedies afforded by the SED Rules at N.J.A.C. 7:22-9.14; accordingly, it is imperative that the project sponsor is aware of the contractor’s intended efforts to meet the SED utilization requirements.

The petitioner recommends an amendment to the rules to require the contractor to “affirm compliance” with the project sponsor’s SED utilization plan and “make a reasonable effort” to comply with the SED requirements. Pursuant to the existing SED Rules, the contractor, not the project sponsor, implements the SED requirements. The petitioner does not suggest a method of

shifting the burden of implementing the SED utilization requirements to the project sponsor; therefore, the recommended amendments are not practicable.

Further, as discussed above, every project sponsor and project are different and will have their own unique requirements and challenges. The existing SED Rules afford flexibility in how a project sponsor and contractor can fulfill their SED utilization obligations. N.J.A.C. 7:22-9.3. If, as the petitioner suggests, the contractor did not submit a contractor's plan, the contractor would be constrained to follow the project sponsor's plan, notwithstanding the uniqueness of a given project. To meet the Infrastructure Trust Act mandate to provide opportunities to SED firms to participate in State financed environmental infrastructure construction projects, N.J.S.A. 58:11B-26, it is vital that contractors be empowered to determine which categories of work can be performed by available, qualified SEDs. Or, if contractors cannot identify SEDs in the designated categories, they be able to adapt and identify other means of using SEDs in the project. To that end, a contractor's plan must list which categories of work are subcontracted to SED firms. The petitioner's proposed system would potentially frustrate the intent of Infrastructure Trust Act and SED Rules by further complicating SED utilization.

The Department acknowledges that the petitioner proposes the promulgation of a project plan sheet to address project-specific issues. However, addressing the unique elements of a project through the project plan sheet does not remedy the issues presented by eliminating the contractor's plan, as the petitioner proposes the project sponsor, not the contractor, draft the project plan sheet. The petitioner's proposed amendments would leave the Department without a way to ensure the individual in the key position of implementing the SED utilization requirements (the contractor), is aware of and complying with SED utilization requirements.

The Department also notes that the petitioner’s request that the SED rules be amended to require contractors “make a reasonable effort” to comply with the SED rules would conflict with the comparable Federal rules, which require “good faith efforts,” and could jeopardize the availability of Federal funds. 40 CFR 33.301. Similarly, the Department’s rules for financial assistance program for environmental infrastructure facilities, of which the SED rules are a part, also require the project sponsor to make a “good faith effort” to award not less than 10 percent of contracts to SED firms. N.J.A.C. 7:22-3.17(a)24, 4.17(a)24, and 6.17(a)24. However, even if the Department were to substitute “good faith effort” for the petitioner’s suggested “reasonable effort,” the deficiencies recited in the discussion above would remain.

#### *List of SED Firms*

After careful consideration, the Department has determined to deny the petitioner’s request to amend the SED Rules to require the Office to maintain a list of SED contractors and subcontractors grouped by project sponsor. The petition is not clear as to whether the requested list grouped “by project sponsor” refers to a list of the SED firms that a particular project sponsor has used in the past, a list of project sponsor’s project locations and the SED firms that worked on each location, a list of project sponsors for which a particular SED firm has worked in the past, or some other type of list. However, whatever the sorting of the list, the Department denies the request.

As required at N.J.A.C. 7:22-9.7(b)2, the Office maintains a list of eligible SED firms and can, upon request, provide the list to project sponsors. In this list, the Department does not separate or highlight SED firms based on metrics, such as work history or location. Grouping based on work history would necessarily require the Department to publicize through the list an SED firm’s work history and background, or lack thereof. This, as well as grouping by location, would create

unacceptable boundaries and divisions among eligible SED firms to the potential detriment of those firms that are new or have little or no history of working with project sponsors. Such a list could appear to be an implied endorsement of SED firms that have prior experience and could quickly lead to a situation where firms with more prior experience have an advantage over those with less.

For these reasons, the Department has determined that the creation of a list as the petitioner requests is not warranted. The list of qualified SED firms that the Department currently maintains in accordance with N.J.A.C. 7:22-9.7(b)2 is sufficient for the purpose of identifying SED firms that a project sponsor or contractor can employ.

### **Conclusion**

For the reasons stated above, the petition is hereby denied. A copy of this notice has been mailed to the petitioner, as required at N.J.A.C. 1:30-4.2.