

OFFICE OF MINORITY AFFAIRS

NASSAU COUNTY

August 26, 2005

Minority and Women-owned Business Enterprise Rules

Section 1. Statement of purpose and intent.

The purpose of these rules is to ensure that Nassau County promotes and provides full and fair opportunities for minority and women-owned business enterprises to compete for and participate in the many business opportunities provided through Nassau County contracts and to ensure that equal employment practices are enforced by all County contractors. They are also designed to ensure that County agencies track the utilization of minority and women-owned business enterprises as contractors and subcontractors on County contracts in order to measure the need for continued or further remedial measures.

Section 2. Scope.

These rules apply to all County contracts and purchase orders in excess of \$100,000 providing for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon, and any other procurement of goods or services in excess of \$25,000. Where these rules refer to subcontracts, they shall apply to all subcontracts, regardless of dollar value, issued for work under any contract that falls within the scope of these rules. The provisions of these rules requiring contractors to retain or submit documentation of best efforts to utilize certified subcontractors and requiring Department head approval prior to subcontracting shall not apply to inter-municipal agreements.

Section 3. Aspirational goals.

Consistent with the availability of minority and women-owned business enterprises (M/WBEs) and the participation goals recommended in MGT of America's consultant report¹ based on such availability, the following percentages are aspirational goals for utilization of certified M/WBEs on the following types of Nassau County contracts and subcontracts thereunder:

Construction -	Professional Services ² -
African/Black American firms: 6%	African/Black American firms: 2%
Hispanic American firms: 5%	Hispanic American firms: 1%
Asian Americans firms: 2%	Asian American firms: 2%
Native Americans firms: .5%	Women-owned firms: 16%
Women-owned firms: 16%	
Other services -	Purchases-
African/Black American firms: 6%	African/Black American firms: 3%
Hispanic American firms: 2%	Hispanic American firms: 2%
Asian American firms: 1%	Asian American firms: 2%
Native American firms: .5%	Native American firms: .5%
Women-owned firms 9%	Women-owned firms: 9%

Progress towards reaching such aspirational goals shall be measured by tracking and evaluating the overall percentage of contract dollars received by the above categories of M/WBEs as contractors and subcontractors on County contracts on an annual basis. It is recognized that aspirational goals specific to the particular types of work undertaken by the County (e.g. public works road reconstruction work) are optimal and these aspirational goals will be adjusted when such information is available.

Section 4. Certification Process.

1. The Executive Director may certify a business as a minority-owned business upon submission of evidence that a business enterprise including a sole proprietorship,

¹ MGT of America is a management consultant company that worked with the Nassau County Minority Affairs Office to study the availability and utilization of minorities as contractors and subcontractors on Nassau County contracts.

² No aspirational goals are set forth for the utilization of Native American firms on professional service contracts because the data gathered by MGT does not support a finding of underutilization of Native American firms.

- partnership or corporation, other than a not-for-profit corporation, is: (a) at least fifty-one percent owned by one or more minority group members; and (b) an enterprise in which minority ownership is real, substantial and continuing; and (c) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and (d) an enterprise authorized to do business in this state and is independently owned and operated.
2. The Executive Director may certify a business as a women-owned business upon submission of evidence that a business enterprise including a sole proprietorship, partnership or corporation, other than a not-for-profit corporation, is: (a) at least fifty-one percent owned by one or more women; and (b) an enterprise in which minority ownership is real, substantial and continuing; and (c) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; and (d) an enterprise authorized to do business in this state and is independently owned and operated.
 3. The Executive Director may also certify M/WBEs based on existing M/WBE Certification from the State of New York and its certifying entities, and any other governmental entity or public authority that has an M/WBE certification program with standards comparable to that of Nassau County. The final determination of whether an M/WBE certification program has standards comparable to that of Nassau County shall be made by the Executive Director. Certification as a Disadvantaged or Small Business Enterprise shall not qualify a vendor for M/WBE status in Nassau County. The Executive Director may certify pursuant to this paragraph upon request of any business enterprise for certification based upon an existing certification. In addition, the Executive Director may certify pursuant to this paragraph on his own initiative, after providing notice to any such firms that he intends to so certify and offering them the opportunity to decline such certification. Notwithstanding certification by the State or other entity, the Executive Director may decline or revoke Nassau County certification based on his own findings.
 4. Following application for certification pursuant to this section, the Executive Director shall provide the applicant with written notice of the status of the application, including notice of any outstanding deficiencies, within thirty days. Within sixty days of submission of a final completed application, the Executive Director shall provide the applicant with written notice of a determination approving

or denying such certification and, in the event of a denial a statement setting forth the reasons therefor.

5. Upon a determination denying or revoking certification, the business enterprise, upon written request made within thirty days from receipt of notice of such determination, shall be entitled to a hearing before an independent hearing officer designated for such purpose by the Executive Director. In the event that a request for a hearing is not made within such thirty-day period, such determination shall be deemed to be final. The independent hearing officer shall conduct a hearing and upon the conclusion of the hearing, issue a written recommendation to the Executive Director to affirm, reverse or modify the determination. Such written recommendation shall be issued to the parties. The Director, within thirty days shall, by order, accept, reject or modify such recommendation of the hearing officer and set forth in writing the reasons therefore. The Director shall serve a copy of such order and reasons therefor upon the business enterprise by personal service or certified mail return receipt requested.
6. The Executive Director shall compile a master list of all certified M/WBEs ("master M/WBE vendor list"), categorized by type of business (personal services, construction, equipment and supplies, or other services) and shall make that list available to all County departments and to contractors upon request.

Section 5. Contracting requirements for County agencies.

Contracting agencies, under the supervision of the Deputy County Executives and with the assistance of the Executive Director, shall seek to reach the aspirational goals set forth in these rules by vigorously encouraging M/WBE prime contractor and subcontractor participation, as follows:

1. Every County Contract shall contain a provision prohibiting discrimination by contractors and all subcontractors based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, and gender identity.
2. Prior to or contemporaneously with issuing bid specifications, an RFP or other solicitation for a County contract, and prior to purchasing off a State contract, the contracting agency shall meet with or send information to the Executive Director describing the project. In addition, the Executive Director may work with specific

- contracting agencies to establish more detailed protocols for notification and review.
3. Bids and Requests for Proposals (RFPs) must be posted on the County website and sent to the Office of Minority Affairs for posting on its website. In addition, sealed bids and RFPs must be sent to all certified M/WBE vendors identified by the Office of Minority Affairs as providing the goods or services sought. When neither competitive sealed bids nor RFPs are utilized, agencies must make good faith efforts to solicit quotes from at least two certified M/WBEs to the extent that two certified M/WBEs exist for the type of work needed. The DCE with oversight responsibility for the contracting agency shall determine if the provisions of this paragraph have been satisfied.
 4. A requirement to use best efforts to utilize certified M/WBEs as subcontractors shall become a part of any contract awarded by the County. The contract shall provide that failure to make such efforts will be deemed as noncompliance with the contract and may result in a breach of the contract. Contract language shall also require contractors to notify and receive approval from the Department Head prior to enter into an agreement with a subcontractor to perform any part of the County contract.
 5. Pre-bid and pre-construction meetings on County contracts shall specifically reference the requirements on County contractors to use best efforts to engage M/WBE subcontractors.
 6. When the contracting agency and the Executive Director fail to agree on the application of these rules to a specific contract or subcontract approval, the Deputy County Executive with oversight responsibility for the contracting agency shall make the final determination on how to proceed.
 7. Each contracting agency shall cooperate with the Executive Director and the Department of Information Technology to track the number and dollar amounts of contracts and subcontracts awarded to M/WBEs and the total number and dollar amounts of contracts and subcontracts awarded to all vendors. These rules do not require the tracking of expenditures of County dollars by not-for-profit corporations or by other municipalities.

Section 6. Requirements for County Contractors

1. County contractors are required to make best efforts to obtain M/WBE participation in subcontracts.
2. Contractors are required to get authorization from the Department Head prior to subcontracting any work and, at the time of such request for authorization, must submit a signed "best efforts checklist", to be provided by the Executive Director, affirming that it has made best efforts to obtain M/WBE participation.
3. In the case of projects under the supervision of the Department of Public Works, in addition to the signed "best efforts checklist" required by subdivision 2 of this section, contractors will be required to submit a utilization plan listing all proposed subcontractors so that, to the greatest extent feasible, all subcontractors will be approved prior to commencing work. Any additions or changes to subcontractors approved under the utilization plan must be approved by the Commissioner. A copy of the utilization plan and any additions or changes thereto shall be submitted by the contractor to the Office of Minority Affairs simultaneously with the submission to the Department of Public Works.
4. At any time after subcontractor approval has been requested and prior to being granted, the contracting agency may require the contractor to submit documentation, as described in paragraphs (a) through (g) of subdivision 5 of this section, to demonstrate that it employed best efforts to obtain M/WBE participation. In addition, the contracting agency may require the contractor to submit such documentation at any time after subcontractor approval when the contracting agency has reasonable cause to believe that the "best efforts checklist" may have been inaccurate. Within ten (10) working days of any such request by the contracting agency, the contractor must submit such documentation.
5. Best efforts include the following, provided that equivalent efforts may be approved by the Executive Director:
 - a. In any written advertisements and solicitations for subcontractors, the Contractor must specifically indicate its interest in receiving bids from M/WBEs and the requirement that subcontractors be equal opportunity employers. In addition, subcontracting opportunities must be advertised in at least two minority, trade or union publications, to be recommended by the Executive Director, in addition to publications of general circulation in Nassau County and surrounding areas or, where the Contractor has chosen not to publicly advertise for subcontractors, bids must be solicited by

telephone, e-mail, facsimile or otherwise, from at least three certified M/WBEs whom the contractor reasonably believes might have the qualifications to do the work. Documentation shall include copies of any public advertisement and a list of the date(s) and names of the publications in which such advertisements appeared. If direct solicitation is used in the alternative to public advertisement, copies of e-mails, facsimile transmission reports, telephone logs or a prime contractor's affidavit detailing time and dates of communication shall be required as part of the documentation.

- b. The contractor is required to provide reasonable time, to the extent feasible given the timeframe of the County contract, for M/WBE subcontractors to respond to bid opportunities according to industry norms and standards. An outline of the schedule/time frame used to solicit and obtain bids from M/WBEs must be included with the best effort documentation.
- c. The contractor must have communication with potential M/WBE subcontractors who have previously expressed interest in the specific project. Thus, when a potential M/WBE subcontractor has, at any point prior to subcontract award, expressed an interest to the contractor in doing work under a particular contract, or when a County officer has indicated to the contractor that an M/WBE subcontractor has expressed an interest in doing work on the contract, the contractor must make follow-up telephone calls or have other communication, such as a personal letter or e-mail encouraging such participation. Telephone logs or copies of e-mails indicating such action, or affidavit detailing time and dates of communication, must be included with the best effort documentation.
- d. M/WBE subcontractors must be allowed to review bid specifications, contract drawings and all other bid/RFP related items at no charge to the M/WBEs, other than reasonable documented costs incurred by the prime contractor that are passed onto the M/WBE. If costs are imposed on the

subcontractor, a statement detailing costs must be included with the best effort documentation.

- e. Negotiations must be held in good faith with interested M/WBEs, and M/WBEs may not be rejected as unqualified or unacceptable without sound business reasons based on (1) a thorough investigation of M/WBE qualifications and capabilities reviewed against industry custom and standards and (2) cost of performance or (3) other legal requirements. The basis for rejecting any M/WBE deemed unqualified by the prime contractor shall be included in the best effort documentation. If an M/WBE is rejected on the basis of cost, the contractor must provide copies or information detailing the cost proposals.
- f. Contractors may not place unreasonable conditions of performance within the scope of work or otherwise impose artificial barriers to M/WBE subcontractor participation. Upon request for best effort documentation, the contractor shall submit a copy of the scope of work and a list of all other conditions of performance.
- g. Contractors may include any other type of documentation they feel necessary to further demonstrate their best efforts.

6. The requirements of this section apply to both M/WBE and non-M/WBE prime contractors.

Section 7. Enforcement

Upon receipt by the Executive Director of a complaint from a contracting agency that a contractor has failed to comply with the provisions of LL14 of 2002, the provisions of these rules or any contractual provisions included in furtherance of LL14 of 2002 or pursuant to these rules, the Director shall attempt to resolve the matter. If efforts to resolve the matter to the satisfaction of all parties are unsuccessful, the Executive Director shall refer the matter, within thirty days of the receipt of the complaint, to the American Arbitration Association for proceeding thereon. Upon conclusion of the arbitration proceedings, the arbitrator shall submit to the Executive Director his or her recommendations regarding the imposition of sanctions, fines or penalties. The Director shall either (a) adopt the recommendation of the arbitrator; or (b) determine that no sanctions, fines or penalties should be imposed; or (c) modify the recommendation of

the arbitrator, provided that such modification shall not expand upon any sanction recommended or impose any new sanction, or increase the amount of any recommended fine or penalty. The Director, within ten days of receipt of the arbitrator's award and recommendations, shall file a determination of such matter and shall cause a copy of such determination to be served upon the respondent by personal service or by certified mail return receipt requested. The award of the arbitrator, and the fines and penalties imposed by the Executive Director, shall be final determinations and may only be vacated or modified as provided in the civil practice law and rules.

In addition, failure to comply with section 6 of these rules, as finally determined by the Executive Director, shall be a material breach of the contract constituting grounds for immediate termination. Once a final determination of failure to comply has been reached by the Executive Director, the determination of whether to terminate a contract shall rest with the Deputy County Executive with oversight responsibility for the contracting agency.

Section 8. Definitions

For purposes of these rules, the following definitions shall apply:

1. Contract – a written agreement or purchase order in excess of \$100,000 providing for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon, or any other procurement of goods or services in excess of \$25,000 but shall not include agreements with the state, municipalities or other public entities.
2. Contracting agency- the agency of the County on behalf of which a contract has been or will be entered; provided, however, that for contracts or purchase orders in relation to which a bid is conducted by the Department of Purchasing, the contracting agency shall be the Department of Purchasing and for contracts or purchase orders in relation to which a bid is conducted by the Department of Public Works, the contracting agency shall be the Department of Public Works.
3. Department Head – the Commissioner, Director or head of the contracting agency.
4. Executive Director – the Executive Director of the Nassau County Office of Minority Affairs; provided, however, that Executive Director shall also include a designee of the Executive Director except in the case of final determinations issued pursuant to section 4 or section 7 of these rules.
5. Minority Group Member – an individual who is a citizen of the United States or a lawfully admitted permanent resident and who is a(n):

- a. African/Black American – A person having origins in any of the black racial groups of Africa;
 - b. Hispanic American –A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish or Portuguese cultures or origins, regardless of race);
 - c. Asian American – A person having origins in the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands; or
 - d. Native American– A person having origins in any of the original peoples of North America who maintains cultural identification through tribal affiliation or community recognition.
6. Other Services – any service that is not professional or construction related. Examples include, but are not limited to: maintenance services, janitorial services, lawn services, employment services, and printing services. The provision of goods is not a service.
7. Professional Services – any service provided by a person or firm that is of a professional nature, requiring special licensing; educational degrees; or unusual or highly specialized expertise. Examples include, but are not limited to: Architectural/Engineering Services, Financial Services, Legal Services, Medical Services and Advertising/Marketing Services, etc.
8. Prime Contractor – a person or firm who will manage and be responsible for an entire contracted project.
9. Subcontractor – a person or firm who performs part or parts of the contracted work of a prime contractor providing services, including construction services, to the County pursuant to a county contract. Subcontractor shall include a person or firm that provides labor, professional or other services, materials or supplies to a prime contractor that are necessary for the prime contractor to fulfill its obligations to provide services to the County pursuant to a county contract. Subcontractor shall not include a supplier of materials to a contractor who has contracted to provide goods but no services to the County, nor a supplier of incidental materials to a contractor, such as office supplies, tools and other items of nominal cost that are utilized in the performance of a service contract. .

Section 9. Severability

If any section of this title or the application thereof to any person or circumstances shall be adjudged invalid by a court of competent jurisdiction, such order or judgment shall

be confined to its operation to the controversy in which it was rendered, and shall not affect or invalidate any other provision or any section or the application of any part thereof to any other person or circumstances, and to this end, the provisions of each section of this title shall be deemed to be severable.

Section 10. Effective date

These rules shall take effect on October 3, 2005 and shall apply to all contracts resulting from bid specifications or solicitations issued after such date. Prior to March 31, 2007, the Executive Director, with the assistance of the contracting agencies and the Department of Information Technology, shall assess the 2005 and 2006 percentage utilization of certified M/WBEs on County contracts and subcontracts. The Executive Director shall thereafter consider whether amendments to the rules are necessary in light of such assessment. The rules shall continue to be reviewed by March 31 of each year thereafter and contract-specific numerical goals for utilization of subcontractors may be added to these rules if information shows persistent underutilization of minorities. Except for the tracking of information, these rules shall be discontinued when the Executive Director determines that M/WBE utilization substantially meets the aspirational goals set forth herein.

Dated:

Signed:

John Moye
Executive Director
Office of Minority Affairs