

2 of 2 DOCUMENTS

NEW JERSEY REGISTER

Copyright © 2008 by the New Jersey Office of Administrative Law

VOLUME 40, ISSUE 12

ISSUE DATE: JUNE 16, 2008

RULE PROPOSALS

TREASURY GENERAL

40 N.J.R. 3601(a)

Proposed Amendments: *N.J.A.C. 17:27*

Proposed Repeal and New Rule: *N.J.A.C. 17:27-7.4*

Proposed Repeals: *N.J.A.C. 17:27-10.6 and 10.7*

Proposed New Rules: *N.J.A.C. 17:27-3.2, 7.3, 10.7, 10.8, 10.9, 10.10 and 12.1*

[Click here to view Interested Persons Statement](#)

DIVISION OF EQUAL EMPLOYMENT OPPORTUNITY IN PUBLIC CONTRACTS

Affirmative Action Rules

Authorized By: R. David Rousseau, State Treasurer.

Authority: *N.J.S.A. 10:5-31* et seq. (P.L. 1975, c. 127), specifically 10:5-36K.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2008-202.

Submit comments by August 15, 2008 to:

Deirdre L. Webster Cobb, Director

Division of Equal Employment Opportunity in Public Contracts

135 West Hanover Street

P.O. Box 209

Trenton, NJ 08625-0209

The agency proposal follows:

Summary

Pursuant to the State Treasurer's general rulemaking authority under N.J.S.A. 10:5-36k, the New Jersey Department of Treasury, **Division of Equal Employment Opportunity in Public Contracts** proposes amendments to its rules at *N.J.A.C. 17:27*, which govern the affirmative action employment practices necessary for public agencies, contractors, subcontractors and business firms to comply with equal employment opportunity standards mandated by *N.J.S.A. 10:5-36 et seq.*, (P.L. 1975, c. 127). The Department proposes to amend the rules in order to further clarify and define the standards that are necessary to implement the law. The amendments also reflect changes that strengthen the Department's enforcement powers. A summary of the subchapters and substantive amendments follows.

Subchapter 1 delineates the policy of the Department regarding affirmative action in the awarding of contracts funded by public agencies as defined herein. *N.J.A.C. 17:27-1.1(b)* has been amended to reflect a shift in the State's focus from affirmative action to equal employment opportunity in public contracting.

Subchapter 2 contains definitions used in the chapter. The subchapter has been amended to define "affirmative action," "affirmative action plan" and "Program Monitoring Unit." It has also been amended to include "demolition" in the definition of "construction contract" and "construction project." The definition of "public works contract" is also being amended to include "gender identity or expression, disability and nationality to the classes protected under the Law Against Discrimination, *N.J.S.A. 10:2-1* consistent with changes to the law which were adopted in July 2007." In addition, the definition of "goods and services contractor" is deleted and a definition of "vendor" added to clarify that a "goods and services contractor," including a professional services contractor, is a "vendor." Further, the amendments reflect the Division's name change from the "Division of Contract Compliance and Equal Employment Opportunity in Public Contracts" to the "**Division of Equal Employment Opportunity in Public Contracts.**" It is hoped that the name change will prevent constituents confusing the Division with the Contract Compliance Unit within the Division of Purchase and Property.

Subchapter 3 contains the general requirements for public agencies that award contracts. Initially, it is noted that throughout the subchapter references to affirmative action have been changed to equal employment opportunity in order to provide consistency with the State's focus on equal employment opportunity versus affirmative action. At *N.J.A.C. 17:27-3.2*, a new rule has been added to set forth the requirements which public agencies must comply with in order to ensure equal employment opportunity in public contracting. This new rule has resulted in the recodification of the remaining sections of the subchapter. The mandatory language for goods and services bid specifications and contracts at proposed *N.J.A.C. 17:27-3.5* and for construction bid specifications and contracts at proposed *N.J.A.C. 17:27-3.6* have been amended to include gender identity or expression, disability and nationality as protected classes under the Law Against Discrimination, *N.J.S.A. 10:2-1*. This is consistent with changes to the law which were implemented in July 2007. However, in making this change, it is important to note that the requirements for equal employment opportunity in public contracting do not include gender identity or expression, disability and nationality. In addition, amendments to the mandatory bid specification and contract language for employment goal compliance for goods and services contracts at proposed *N.J.A.C. 17:27-3.7* and for construction contracts at proposed *N.J.A.C. 17:27-3.8* shift the focus from affirmative action to equal employment opportunity. Specifically, the requirement of employment goal compliance has been changed to good faith efforts toward achieving equal employment opportunities. With respect to construction, the amendments also clarify that employment practices including, recruitment, hiring, scheduling, layoff of workers on a public works project must be done in accordance with the equal employment opportunity and non-discriminatory principles set forth in the rules. Furthermore, the amendments state that contractors and subcontractors must provide the Division with evidence of good faith efforts, upon request.

Subchapter 4 outlines the affirmative action plan requirements for vendors. *N.J.A.C. 17:27-4.6* is being amended to require vendors to pay a \$ 150.00 fee for the initial issuance and renewal of a Certificate of Employee Information Report. Amendments to this subchapter also clarify that the Employee Information Report (AA-302 form), which must be submitted to the Division in order to obtain a Certificate of Employee Information Report, must contain employee data that evidences that the vendor has made good faith efforts to meet targeted employment goals or an explanation of the hiring and personnel practices the vendor plans to implement in order to ensure equal employment opportunity, as requested by the Division.

Subchapter 5 describes minority and women employment goal obligations for vendors and their subcontractors. Amendments to this subchapter reiterate the State's focus on equal employment opportunity versus affirmative action by changing the references to meeting applicable employment goals to making good faith efforts to meet targeted employment goals. They also set forth additional criteria for determining good faith efforts and require that good faith efforts documentation be submitted to the Division, upon request.

Subchapter 6 discusses the affirmative action plan requirements for construction contractors and subcontractors. No substantive changes have been made to this subchapter. The only amendments are technical in nature and necessary to reflect the recodification of other rules referenced in the subchapter.

Subchapter 7 describes minority and women employment goal obligations for construction contractors and subcontractors. *N.J.A.C. 17:27-7.3*, which contains the establishment of targeted goal requirements for construction, is proposed to be recodified as *N.J.A.C. 17:27-7.2*, which is currently reserved. The rule is being amended to provide that the Division will discuss the contractor's responsibilities, the targeted employment goals and good faith efforts criteria either at a preconstruction or initial job meeting or during the first site monitoring visit. Proposed new *N.J.A.C. 17:27-7.3* sets forth the contractor and subcontractor's compliance obligations. Specifically, a contractor or subcontractor will be deemed to have fulfilled compliance obligations if it has employed minority and women workers in the percentages established as employment goals or if it has provided good faith efforts documentation. *N.J.A.C. 17:27-7.4*, concerning the financing of minority and women worker outreach and training programs for minorities and women in the construction trades, has been repealed. Proposed new *N.J.A.C. 17:27-7.4* delineates the criteria the Division considers in determining a contractor or subcontractor's good faith efforts to employ minorities and women in the construction trades. It is noted that the rules concerning financing of minority and women worker outreach and training programs are now found at *N.J.A.C. 17:27-12*.

Subchapter 8 is reserved.

Subchapter 9 sets forth requirements related to the monitoring of public works contracts. There are no amendments to this subchapter.

Subchapter 10 sets forth compliance procedures and sanctions applicable to public works contracts. *N.J.A.C. 17:27-10.5*, which provides for the correction of public agency violations, is being amended to give a public agency 30 days from the receipt of a letter advisement to correct the violation. If the violation is not corrected within this time period, the public agency may be subject to further review by the Division or the issuance of a show cause letter. *N.J.A.C. 17:27-10.6*, which provides for written statements and an investigatory conference, *N.J.A.C. 17:27-10.7*, which provides for a meeting with or technical assistance from the Division, and *N.J.A.C. 17:27-10.8*, which was previously reserved, have been repealed. It is noted that the repeal of these sections has resulted in the recodification of the subchapter. *N.J.A.C. 17:27-10.9*, which contains the enforcement and violation provisions, is recodified as *N.J.A.C. 17:27-10.6*. However, the section has been amended to set forth indicia that the Division may consider in determining whether a construction contractor, vendor or public agency has violated the requirements of the chapter or of an affirmative action plan. The amendments also clarify the remedial actions that may be taken for violations of the chapter or affirmative action plan. Although the Division's authority to withhold payment, debar and terminate or suspend a contract has been deleted, a contractor, vendor or their subcontractors may still be subjected to such remedial actions where the Division refers a record of violation to the contracting agency which has authority to take the action. Proposed new *N.J.A.C. 17:27-10.7* delineates the fines and penalties that may be imposed for violations of the Act or its implementing rules. The new rules also note the factors the Division will consider in assessing a fine or penalty. The right to appeal and have a hearing regarding the issuance of these fines and penalties is delineated at new *N.J.A.C. 17:27-10.8*. New *N.J.A.C. 17:27-10.9* codifies the Department of Treasury's policy to consider a construction contractor's non-compliance with affirmative action requirements as a factor in determining the contractor's aggregate rating for the award of a public contract. The provision for a meeting with or technical assistance from the Division previously found at *N.J.A.C. 17:27-10.7* is now found at new *N.J.A.C. 17:27-10.10*.

Subchapter 11 contains provisions regarding the furnishing of reports to the Department by public works contractors, vendors, subcontractors and public agencies. No amendments have been made to this subchapter.

Subchapter 12 discusses training, referral and outreach programs for minorities and women. The subchapter has been amended by adding new *N.J.A.C. 17:27-12.1* to provide an on-going pool of funding for the New Jersey Department of Labor and Workforce Development to effectively administer an outreach and training program for minorities and women in the construction trades. As a result of this new rule, the funding of this program will no longer be dependent on the issuance of sanctions against non-compliant construction contractors. Instead, the funding will be set forth in the Appropriations Act, by statute or other means permitted by law. It is noted that the State agencies that are required to contribute training funds to finance the program will be notified of the funding mechanism by the Division Director annually. Also, local governments will no longer be required to contribute funds to finance the training program. Subsequent sections in the subchapter are recodified accordingly.

As the Department provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The Division of Contract Compliance and Equal Employment Opportunity in Public Contracts believes that the proposed amendments, repeals and new rules will have a positive social impact. The proposed amendments, repeals and new rules carry forward and implement the Legislature's intent, as set forth in *N.J.S.A. 10:5-31* et seq., to promote equal employment opportunity and prohibit discrimination in employment in the performance of public contracts. The proposed amendments, repeals and new rules strengthen the regulatory framework which implements the law by ensuring that construction contractors, vendors, and public agencies have a thorough understanding of the standards with which they must comply in order to ensure that minorities and women are given a fair chance for employment on public contracts as well as the consequences for non-compliance. In comparison to overall population percentages, minorities and women continue to be under-represented in the workforce, particularly, in the construction industry. Given this under-representation, which is evidenced by empirical evidence maintained by the Division, the proposed amendments, repeals and new rules are not only reasonable and proper, but also necessary to ensure equal employment opportunity for minorities and women on public contracts.

The proposed amendments, repeals and new rules will also have a positive social impact in that they will help level the playing field for women and minorities who want to access apprenticeship and employment in the building trades. Building trades, which represent high wage/high skill careers, are among the occupational areas that continue to show a disproportionately low number of minorities and women among the workforce. By establishing a pool of on-going funding for minority and women worker outreach and training programs, the proposed amendments, repeals and new rules will increase the number of qualified minorities and women available to compete in high wage/high skill careers in the construction trades and help construction contractors fulfill their good faith efforts obligations. The outreach and training programs will also assist in decreasing the number of unemployed persons and those in need of public assistance.

Economic Impact

The proposed amendments, repeals and new rules are expected to have a positive economic impact as they will assist in increasing the number of minorities and women employed on public works projects in New Jersey by clarifying requirements for ensuring equal employment opportunity that are imposed on construction contractors, vendors and public agencies. The proposed amendments, repeals and new rules reduce confusion and thereby the number of time-consuming challenges that arise from misunderstanding the requirements. As a result, the amendments, repeals and new rules are expected to have a positive impact on public agencies, contractors, vendors and subcontractors who will benefit from a decrease in sanctions and penalties resulting from non-compliance.

It is noted that the proposed amendments, repeals and new rules will impose economic costs on public agencies, contractors and vendors who fail to comply with the equal employment opportunity requirements. Specifically, the amendments and new rules provide for the imposition of fines and penalties for violations of the law and regulations as well as the right to appeal and for a hearing. Other economic costs resulting from the proposed amendments include the imposition of a \$ 150.00 fee for the issuance and renewal of a Certificate of Employee Information Report. It is noted that this cost is only imposed on vendors. The fee will be imposed on vendors with a workforce of 50 or more every three years and on vendors with a workforce of 50 or less every seven years. The fee is necessary to offset the Division's operating costs and will help improve the Division's effectiveness and efficiency in providing a fair and equitable system for monitoring contracts funded with public funds.

Of particular note is the positive economic impact that the proposed amendments, repeals and new rules are expected to have on the construction trades, where the number of minorities and women employed on public contracts is significantly low. Construction is one of the five industries deemed as pivotal to New Jersey's growth. Increased demand for workers will be stimulated by the retirement of an aging union membership and the rise in school and other public construction projects. Contractors will need a skilled labor force to bid on emerging projects, many of which will take place in areas where high unemployment and underemployment of women and minorities exists. The proposed new rule related to the financing of outreach and training programs for minorities and women will provide contractors with a pool of qualified skilled minorities and women tradespersons and assist them in fulfilling their equal employment opportunity obligations. Specifically, the new rule will establish an on-going pool of funding for the Department of Labor's outreach and training program for minorities and women in the construction trades. Currently, the program is funded with the one half of one percent training funds which public agencies must allocate from the total cost of a construction project. The training fund allocation applies to construction contracts awarded by State agencies that are equal to or greater than \$ 1,000,000 and to construction contracts awarded by any other public agency that are equal to or greater than \$ 2,500,000. The training fund allocation is released to the Department of Labor and Workforce Development when the Division issues a sanction against a construction contractor for failure to make good faith efforts to hire minorities and women on the construction project in accordance with targeted goals. Under the proposed new rule, the release of the training fund allocation will no longer be based on the issuance of sanctions and local government agencies will no longer be required to allocate the one-half of one percent training funds. Instead, the allocation will be limited to State agencies which are required to pay the one-half of one percent training fund allocation to the Department of Labor and Workforce Development immediately upon award of the contract. Although this new rule will have a significant economic impact on State agencies, the impact is positive and necessary to ensure a continued flow of funds to the Department of Labor and Workforce Development so that it can effectively develop and implement a construction trades training program for minorities and women. Also, in addition to providing a much needed skilled workforce for construction contractors as noted above, the proposed amendments and new rules will enable minorities and women to obtain training that qualifies them for high skill/high wage positions and enables them to sustain themselves and their families. Furthermore, they will help the State of New Jersey reduce the unemployment and public assistance rolls and increase the number of wage earners contributing to the State's economy.

Federal Standard Statement

The proposed amendments, repeals and new rules do not exceed standards or requirements imposed by Federal law. In fact, the proposed amendments, repeals and new rules provide improved consistency with the equal employment opportunity requirements of the Office of Federal Contract Compliance Programs (OFCCP). As a result, a Federal standards analysis is not required.

Jobs Impact

The proposed amendments, repeals and new rules will have a positive impact on jobs as they will ensure that minorities and women have an equal opportunity for employment on public contracts including construction contractors and contracts for goods and services and professional services. Of particular note, however, is proposed new *N.J.A.C.*

17:27-12.1 which provides for the financing of minority and women worker outreach and training programs in the construction trades. The new rule provides an on-going pool of funding for the Department of Labor and Workforce Development to administer an effective program. Upon completion of the training program, minorities and women trainees will be qualified for employment on any construction project. The ability of minorities and women to obtain high skill/high wage positions in the construction trades will generally benefit all interested parties. As noted above, jobs in the construction trades offer wages and benefits that enable workers to sustain them and their families. In addition, the increase of job opportunities for minorities and women will benefit the State of New Jersey by reducing unemployment and public assistance rolls and increasing the number of wage earners that could contribute to the State's economy. As there will be an increased demand for workers stimulated by the retirement of an aging union membership and the rise in school construction and other public projects, contractors and subcontractors will benefit from the skilled labor force necessary to perform work on projects, located throughout the State. It is noted that many of these projects will be constructed in areas where there exist high unemployment and underemployment of women and minorities.

Agriculture Industry Statement

The proposed amendments, repeals and new rules are not expected to have any impact on the agriculture industry in the State of New Jersey.

Regulatory Flexibility Statement

The proposed amendments, repeals and new rules affect contractors and subcontractors who are awarded public contracts in the State of New Jersey, some of which may be small businesses, as defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et. seq. The proposed amendments, repeals and new rules do not impose new compliance, reporting or recordkeeping requirements but rather continue and clarify existing reporting and recordkeeping requirements that are mandated by *N.J.S.A. 10:5-31* et seq. and are necessary to ensure equal employment opportunity in public contracts. However, they do impose costs on small businesses in the form of fines and penalties for non-compliance with equal employment opportunity requirements and a \$ 150.00 fee for the issuance and renewal of a Certificate of Employee Information Report. In order to ensure a fair, equitable and comprehensive equal employment opportunity program, no differentiation in existing compliance, reporting or record-keeping requirements based on business size can be provided. However, it is noted that the fee for the issuance and renewal of a Certificate of Employee Information Report would be imposed on vendors with a workforce of 50 or less every seven years versus every and three years on vendors with a workforce of 50 or more. As previously mentioned, this fee is necessary to offset the Division's operating costs and will help improve the Division's effectiveness and efficiency in providing a fair and equitable system for monitoring contracts funded with public funds. In addition, it is noted that no professional services will be required to comply with the proposed amendments, repeals and new rules.

Smart Growth Impact

Any impact from the proposed amendments, repeals and new rules with respect to the achievement of smart growth and the implementation of the State Development and Redevelopment Plan would be the result of the increase of minority and women employment on public contracts within designated smart growth areas.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at *N.J.A.C. 17:27-7.4, 10.6* and *10.7*.

Full text of the proposed amendments and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 27

EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION RULES

SUBCHAPTER 1. INTRODUCTION AND POLICY

17:27-1.1 Policy

(a) (No change.)

(b) These rules establish the affirmative action employment practices necessary for public agencies, contractors, subcontractors, and business firms to comply with the equal employment opportunity standards of *N.J.S.A 10:5-31* et seq. To assure effective implementation of the **equal employment opportunity and** affirmative action requirements of *N.J.S.A 10:5-31* et seq., these rules prescribe procedures designed to minimize administrative paperwork, delays and unproductive red-tape.

SUBCHAPTER 2. DEFINITIONS

17:27-2.1 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

...

"Affirmative action," whether used separately or in combination with other words or phrases (including, but not limited to, "program," "equal employment opportunity" and "EEO/AA"), means good faith steps taken to ensure equal opportunity employment for women and minority workers but does not include employment quotas, except where otherwise permitted and appropriate under applicable law.

"Affirmative action plan" means a plan that complies with the provisions of N.J.A.C. 17:27-4 or 6.

...

"Construction contract" means any contract entered into by a public agency for the construction, alteration, [or] repair **or demolition** of any building or other public work.

...

"Construction project" means the construction, alteration, [or] repair **or demolition** of the specific building or other public work that is the subject of a construction contract.

...

"Director" means the State official in charge of the Division of [Contract Compliance and] Equal Employment Opportunity in Public Contracts.

"Division" means the Division of [Contract Compliance and] Equal Employment Opportunity in Public Contracts established in the State of New Jersey, Department of the Treasury.

...

["Goods and services contractor" means any party, including a provider of professional services, that enters into or

offers to enter into a good and services contract with a public agency.]

...

"Program Monitoring Unit" means the Construction Unit, Procurement Unit or Public Agency Unit, within the Division of Equal Employment Opportunity in Public Contracts, which are responsible for monitoring the equal employment opportunity/affirmative action compliance of construction contractors, goods and services and professional service vendors and public agencies, respectively.

...

"Public works contract" means any contract to be performed for or on behalf of the State or any county or municipality or other political subdivision of the State, or any agency or authority created by any of the foregoing, for the construction, alteration, [or] repair or demolition of any building or public work or for the acquisition of materials, equipment, supplies or goods and services, including professional services, with respect to which discrimination in the hiring of persons for the performance of work thereunder or under any subcontract thereunder by reason of race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex is prohibited under *N.J.S.A. 10:2-1*.

...

"Vendor" means any party, including a provider of professional services, that enters into or offers to enter into a goods and services contract with a public agency.

SUBCHAPTER 3. GENERAL REQUIREMENTS FOR PUBLIC AGENCIES AWARDING CONTRACTS

17:27-3.2 Public agency requirements; generally

(a) Public agencies shall comply with the following requirements in order to ensure equal employment opportunity in public contracting:

- 1. Comply with any rules promulgated by the Division with respect to their obligations to assist with equal employment opportunity and affirmative action compliance and enforcement efforts;**
- 2. Cooperate fully with the Division in the establishment and implementation of guidelines for determining whether a construction contractor or vendor has failed to provide equal employment opportunity in the hiring of minorities and women on public contracts;**
- 3. Include mandatory equal employment opportunity and affirmative action language in its advertisements, bids, specifications and contracts;**
- 4. Include in each contract the State's intent to carry out its responsibilities requiring equal employment opportunity and affirmative action by vendors and construction contractors, the vendor and contractor's obligations under the law and related regulations, and the consequences of the failure to do so;**
- 5. Provide vendors and construction contractors with documentation describing the relevant law and rules and, as requested, copies of same;**
- 6. Provide to the Division any information which indicates that a construction contractor or goods and services vendor is not in compliance with equal employment opportunity requirements and fully cooperate in any**

Division investigation of such entity's compliance with these requirements;

7. Provide the Division with such other information as it shall request and as shall be necessary to enable the Division to fulfill its mission;

8. Require parties to contracts awarded by the public agency to certify that they are in compliance with equal employment opportunity and affirmative action in public contracting requirements;

9. Include in any public contract a provision requiring all parties to the contract and any subcontracts thereof to make a good faith effort to provide equal employment opportunity for minorities and women, and further providing that a failure to make good faith efforts to provide equal employment opportunity for minorities and women may result in fines/penalties, suspension/debarment, a determination to lower a construction contractor's aggregate rating or such other action as provided by law; and

10. Provide the Division with such other information as it shall request and as shall be necessary to enable the Division to fulfill its mission.

Recodify existing *N.J.A.C. 17:27-3.2* and *3.3* as **17:27-3.3** and **3.4** (No change in text.)

17:27-[3.4]**3.5** Mandatory language for goods and services bid specifications and contracts

(a) A public agency shall include in all bid specifications and contracts for goods and services the language required by *N.J.A.C. 17:27-[3.6(a)]3.7(a)*. Also, bid specifications and contracts for goods and services, that are not subject to a Federally approved or sanctioned affirmative action program, shall include the following additional language:

1. (No change.)

2. During the performance of this contract, the contractor agrees as follows:

i. The contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex. Except with respect to affectional or sexual orientation **and gender identity or expression**, the contractor will [take affirmative action to] ensure that **equal employment opportunity is afforded to** such applicants [are recruited and employed] **in recruitment and employment**, and that **all** employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex. Such [action] **equal employment opportunity** shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the public agency compliance officer setting forth provisions of this nondiscrimination clause;

ii. The contractor or subcontractor, where applicable, will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex;

iii.-iv. (No change.)

17:27-[3.5]**3.6** Mandatory language for construction bid specifications and contracts

(a) A public agency shall include in all bid specifications and contracts for construction the language required by *N.J.A.C. 17:27-[3.7(a)]3.8(a)*. Also, all bid specifications and contracts for construction that are not subject to a Federally approved or sanctioned affirmative action program shall include the following additional language:

1. (No change.)

2. During the performance of this contract, the contractor agrees as follows:

i. The contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex. Except with respect to affectional or sexual orientation **and gender identity or expression**, the contractor will [take affirmative action to] ensure that **equal employment opportunity is afforded to** such applicants [are recruited and employed] **in recruitment and employment**, and that **all** employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex. Such [action] **equal employment opportunity** shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the public agency compliance officer setting forth provisions of this nondiscrimination clause;

ii. The contractor or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex;

iii.-iv. (No change.)

(b) The public agency shall also include in all construction contracts and bid specifications, the language required by *N.J.A.C. 17:27-[3.7]3.8*, unless the exemption provided under *N.J.A.C. 17:27-7.1* is applicable.

(c) (No change.)

17:27-[3.6]3.7 Mandatory bid specification and contract language for [employment goal compliance for] **good faith efforts toward achieving equal employment opportunities in goods and services contracts**

(a) Public agencies shall include in all bid specifications and contracts for goods and services, including contracts for professional services, the following mandatory language for [employment goal compliance] **equal employment opportunities**:

1. The contractor or subcontractor agrees to make good faith efforts to [employ] **afford equal employment opportunities to** minority and women workers consistent with:

i. [The applicable] **Good faith efforts to meet targeted** county employment goals established in accordance with *N.J.A.C. 17:27-5.2*; or

ii. [A binding determination of the applicable] **Good faith efforts to meet targeted** county employment goals determined by the Division, pursuant to *N.J.A.C. 17:27-5.2*.

2. The contractor or subcontractor agrees to inform in writing its appropriate recruitment agencies including, but not limited to, employment agencies, placement bureaus, colleges, universities, labor unions, that it does not discriminate on the basis of age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices.

3. (No change.)

4. In conforming with the [applicable] **targeted** employment goals, the contractor or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, **gender identity or expression, disability, nationality** or sex, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions.

17:27-[3.7]3.8 Mandatory bid specification and contract language for [employment goal compliance for] **good faith efforts toward achieving equal employment opportunities in** construction contracts

(a) Public agencies shall include in contracts and bid specifications the following mandatory language for [employment goal compliance] **equal employment opportunities**:

1. When hiring or scheduling workers in each construction trade, the contractor or subcontractor agrees to make good faith efforts to employ minority and women workers in each construction trade consistent with the [applicable] **targeted** employment goal prescribed by *N.J.A.C. 17:27-[7.3]7.2*; provided, however, that the Division may, in its discretion, exempt a contractor or subcontractor from compliance with the good faith procedures prescribed by (a)1i and 2 below, as long as the Division is satisfied that the contractor or subcontractor is employing workers provided by a union which provides evidence, in accordance with standards prescribed by the Division that its percentage of active "card carrying" members who are minority and women workers is equal to or greater than the [applicable] **targeted** employment goal established in accordance with *N.J.A.C. 17:27-[7.3]7.2*. The contractor or subcontractor agrees that a good faith effort shall include compliance with the following procedures:

i. If the contractor or subcontractor has a referral agreement or arrangement with a union for a construction trade, the contractor or subcontractor shall, within three business days of the contract award, seek assurances from the union that it will cooperate with the contractor or subcontractor as it fulfills its affirmative action obligations under this contract and in accordance with the rules promulgated by the Treasurer, pursuant to *N.J.S.A. 10:5-31* et seq., as supplemented and amended from time to time. If the contractor or subcontractor is unable to obtain said assurances from the construction trade union at least five business days prior to the commencement of construction work, the contractor or subcontractor agrees to [attempt to hire or schedule] **afford equal employment opportunities to** minority and women workers directly, consistent with the [applicable employment goal] **this chapter**. If the contractor's or subcontractor's prior experience with a construction trade union, regardless of whether the union has provided said assurances, indicates a significant possibility that the trade union will not refer sufficient minority and women workers consistent with [the applicable employment goal] **affording equal employment opportunities as specified in this chapter**, the contractor or subcontractor agrees to be prepared to [hire or schedule] **provide such opportunities to** minority and women workers directly, consistent with [the applicable employment goal] **this chapter**, by complying with the [hiring or scheduling] procedures prescribed under (a)2 below; and the contractor or subcontractor further agrees to take said action immediately if it determines or is so notified by the Division that the union is not referring minority and women workers consistent with the [applicable] **equal employment opportunity goals set forth in this chapter**.

2. If [the hiring or scheduling of a workforce consistent with the employment goal has not or cannot be achieved] **good faith efforts to meet targeted employment goals have not or cannot be met** for each construction trade by adhering to the procedures of (a)1 above, or if the contractor does not have a referral agreement or arrangement with a union for a

construction trade, the contractor or subcontractor agrees to take the following actions [consistent with the applicable county employment goals]:

i.-iii. (No change.)

iv. To leave standing requests for additional referral [to] **of** minority and women workers with the local construction trade union, provided the contractor or subcontractor has a referral agreement or arrangement with a union for the construction trade, the State training and employment service and other approved referral sources in the area [until such time as the workforce is consistent with the employment goal];

v. If it is necessary to lay off any of the workers in a given trade on the construction site, [to assure, consistent with the applicable State and Federal statutes and court decisions, that sufficient minority and women employees remain on the site consistent with the employment goal; and to employ any minority and women workers laid off by the contractor on any other construction site on which its workforce composition is not consistent with an employment goal established pursuant to rules implementing *N.J.S.A. 10:5-31 et seq.*] **layoffs shall be conducted in compliance with the equal employment opportunity and non-discrimination standards set forth in this chapter, as well as with applicable Federal and State court decisions;**

vi. To adhere to the following procedure when minority and women workers apply or are referred to the contractor or subcontractor:

(1) If said individuals have never previously received any document or certification signifying a level of qualification lower than that required in order to perform the work of the construction trade, the contractor or subcontractor shall **in good faith** determine the qualifications of such individuals. [and if the contractor's or subcontractor's workforce in each construction trade is not consistent with the applicable employment goal, it] **The contractor or subcontractor** shall hire or schedule those individuals who satisfy appropriate qualification standards **in conformity with the equal employment opportunity and non-discrimination principles set forth in this chapter.** However, a contractor or subcontractor shall determine that the individual at least possesses the requisite skills, and experience as recognized by a union, apprentice program or a referral agency, provided the referral agency is acceptable to the Division. If necessary, the contractor or subcontractor shall consider the recruitment and [hire or schedule] **hiring or scheduling** of minority and women workers who qualify as trainees pursuant to these rules. All of these requirements, however, are limited by the provisions of (a)3 below.

(2) [If the contractor's or subcontractor's workforce is consistent with the applicable employment goal, the] **The** name of any interested [women] **woman** or minority individual shall be maintained on a waiting list, [for the first consideration, in the event the contractor's or subcontractor's workforce is no longer consistent with the applicable employment goal.] **and shall be considered for employment as described in paragraph (a)2vi(1) above, whenever vacancies occur. At the request of the Division, the contractor or subcontractor shall provide evidence of its good faith efforts to employ women and minorities from the list to fill vacancies.**

(3) (No change.)

vii. (No change.)

3.-4. (No change.)

17:27-[3.8]**3.9** (No change in text.)

17:27-[3.9]**3.10** State-approved public agency affirmative action construction programs

(a) (No change.)

(b) The Division may designate a public agency's affirmative action construction program as State-approved only if the program requires the public agency's construction contracts to conform to the mandatory contract language requirements of *N.J.A.C. 17:27-[3.5(b)]3.6(b)*. Said program requires the public agency's advertisement and solicitation of construction contract bids to contain the following language: "Bidders are required to comply with requirements of *N.J.S.A. 10:5-31* et seq.," and said program establishes [an] **targeted** employment goal which is not lower than the [applicable] **targeted** goal established by *N.J.A.C. 17:27-[7.3]7.2*.

(c)-(f) (No change.)

(g) Any construction contractor or subcontractor that submits appropriate evidence, in accordance with *N.J.A.C. 17:27-[3.5(c)]3.6(c)*, that it is operating under an existing Federally approved or sanctioned affirmative action program to a public agency, including a public agency which is operating under its own State-approved affirmative action construction program, shall be deemed to have satisfied the affirmative action requirements of *N.J.S.A. 10:5-31* et seq. The determination of the Division as to what constitutes such appropriate evidence shall be binding on the contractor or subcontractor.

SUBCHAPTER 4. AFFIRMATIVE ACTION PLAN FOR GOODS AND SERVICES CONTRACTORS AND SUBCONTRACTORS

17:27-4.2 Elements of an affirmative action plan for goods and services contractors

(a) An affirmative action plan for goods and services contractors shall consist of the following elements:

1. Provisions in the goods and services contract, including professional services contracts, containing the language required by *N.J.A.C. 17:27-[3.4(a)]* and *3.6] 3.5(a) and 3.7*;

2.-3. (No change.)

17:27-4.3 Procedure for establishing an approved affirmative action plan by contract

(a) Upon awarding a goods and services contract, including a professional services contract, the public agency shall submit to the contractor for signing a contract which contains the contract language required by *N.J.A.C. 17:27-[3.4(a)]* and *3.6] 3.5(a) and 3.7*, subject to the following:

1. (No change.)

2. If the contractor submits appropriate evidence of an existing Federally approved or sanctioned affirmative action program, the contract shall not include the mandatory language required by *N.J.A.C. 17:27-[3.4(a)]2]3.5(a)2* and by *[3.6]3.7*.

3. (No change.)

(b) If a goods and services contractor, including a professional services contractor, refuses to sign a contract because it contains the contract language required by *N.J.A.C. 17:27-[3.4(a)]3.5(a)*, when it is submitted for signing by the public agency and/or if the contractor has failed to satisfy the condition for entering into a contract required by (a)1 above, the public agency shall rescind the award, and these requirements shall apply to any other contractor which the public agency selects in accordance with applicable contracting laws and procedures.

17:27-4.6 Procedures for the issuance and renewal of a certificate of employee information report

(a) A contractor that has submitted an employee information report to a public agency pursuant to *N.J.A.C. 17:27-4.3*, and any subcontractor that has submitted an employee information report pursuant to *N.J.A.C. 17:27-4.4*, shall immediately provide a copy of said report to the Division **with a fee of \$ 150.00 payable to the Treasurer, State of New Jersey**.

(b) (No change.)

(c) Additional procedures are as follows:

1. As early as 90 business days prior to the expiration of a certificate of employee information report, a goods and services contractor, including a professional services contractor, may submit an application for renewal of the certificate of employee information report **with a fee in the amount of \$ 150.00 payable to the Treasurer, State of New Jersey** to the Division. Said renewal application, in the form specified by the Division, shall be made available to goods and services contractors, including a professional services contractor, by the Division.

2. In accordance with the form specified by the Division, the goods and services contractor, including a professional services contractor, shall submit, along with its application for renewal **and required fee**, an updated employee information report which shall contain current employee data, the employee data contained in the prior employee information report approved by the Division, the **targeted** employment goals [under] which the contractor has been [operating] **making good faith efforts to meet** during the period covered by the certificate or employee information report approval for which renewal is requested, any additional information requested by the Division and, if necessary, an explanation of why the hiring and other personnel procedures employed by the contractor have failed to [achieve] **produce good faith efforts to reach** the [applicable] **targeted** employment goals established pursuant to *N.J.A.C. 17:27-5.2*; and an explanation of changes in hiring and personnel practices, if any, which the contractor plans to implement expeditiously to increase minority and women employment opportunities in pursuit of the [applicable] **targeted** employment goals. Notwithstanding the content and scope of the procedures which a contractor reports in an employee information report that he or she will implement in pursuit of the [applicable] **targeted** employment goals, said contractor is obligated to **make good faith efforts to** implement and comply with any hiring procedures and personnel practices required by this chapter including, but not limited to, procedures required by the Division pursuant to this chapter.

3. (No change.)

(d) (No change.)

SUBCHAPTER 5. TARGETED MINORITY AND WOMEN EMPLOYMENT GOALS [OBLIGATIONS] FOR DETERMINING GOOD FAITH EQUAL EMPLOYMENT OPPORTUNITY EFFORTS BY GOODS AND SERVICES CONTRACTORS AND SUBCONTRACTORS

17:27-5.2 Establishment of **targeted** goals

(a)-(c) (No change.)

(d) Goods and services contractor and subcontractor submitting an application for renewal of a certificate of employee information report, pursuant to *N.J.A.C. 17:27-4.6(c)*, shall include information detailing the occupational classes that comprise each EEO category within their workforce to provide the Division with information to establish the [individualized] **targeted** goals prior to the compliance review.

(e) In cases in which a public agency, contractor, subcontractor, or affected minority or woman worker submits in writing a request to the Division for a determination of what [employment] **targeted** goals should apply [for] **to determine the good faith equal employment opportunity efforts of** goods and services contractors or subcontractors, the Division shall determine the proper [employment] **targeted** goals. Any such employment goal determination by the Division shall be binding on the goods and services contractor or subcontractor.

17:27-5.4 Contractor and subcontractor compliance obligations

(a) A goods and services contractor or subcontractor shall be deemed to be in compliance with the employment goals pursuant to this subchapter, if the contractor or subcontractor is employing minority and women workers in the percentages established as [employment] **targeted** goals pursuant to this subchapter, and achievement of said employment percentages shall constitute compliance for purposes of this chapter, regardless of any other percentages established by a public agency; or if the contractor or subcontractor has acted and continues to act in good faith, including the use of the procedures required by the mandatory language prescribed by *N.J.A.C. 17:27-[3.6]***3.7**, to achieve the **targeted** minority and women employment goal percentages established in accordance with this subchapter.

(b) **The contractor or subcontractor agrees to provide documentation that it has made good faith efforts to meet equal employment opportunity requirements whenever the Division or public agency, upon its own initiative or upon the complaint of any member of the public, determines that such information is needed to determine whether the contractor or subcontractor has failed to comply with the applicable equal employment opportunity requirements.**

17:27-5.5 Criteria for determining good faith

(a) [When compliance challenges are initiated pursuant to N.J.A.C. 17:27-10] **In addition to the contractor or subcontractor's compliance with the requirements set forth in the mandatory language at *N.J.A.C. 17:27-3.5* or *3.6*, as applicable**, the Division shall consider the following factors in its determination of whether a contractor or subcontractor has acted in good faith[.];

- 1. Whether the contractor or subcontractor has agreed to make a good faith effort to adhere to targeted minority and female employment goals;**
- 2. Whether the contractor or subcontractor has met or documented that it has made a good faith effort to meet targeted employment goals;**
- 3. Whether the contractor or subcontractor has adopted an Equal Employment Opportunity (EEO) Policy;**
- 4. Whether the contractor or subcontractor has posted an EEO Policy on the job site bulletin board;**
- 5. Whether the contractor or subcontractor has disseminated the EEO Policy to its workers through various means including company meetings, preconstruction job meetings, written notices, etc.;**
- 6. Whether the contractor or subcontractor has posted Federal or State issued EEO posters on the job site bulletin board;**
- 7. Whether the contractor or subcontractor has identified an EEO Officer and established job duties in writing for such position;**
- 8. Whether the contractor of subcontractor has developed a basic complaint procedure;**

Recodify existing 1.-5. as **9.-13.** (No change in text.)

[6.] **14.** Whether the contractor or subcontractor has utilized the available recruitment resources to attract minorities and women with requisite skills, including, but not limited to, **public and private** training institutions, job placement services, referral agencies, newspapers, trade papers, faith-based organizations, and community-based organizations; [and

7. Whether the contractor or subcontractor has documented its attempts to attain the goals.]

15. Whether the contractor or subcontractor has requested qualified minorities and women from a labor union with whom it has an exclusive hiring or referral arrangement;

16. Whether the contractor or subcontractor has actively recruited beyond the traditional sources to attract minority and female applicants;

17. Whether the contractor or subcontractor has reviewed all personnel actions to ensure actions are taken in compliance with the company's EEO policy; and

18. Whether the contractor or subcontractor has retained records of employment and personnel actions and payroll records for a three year period from the date of the contract or project closing.

SUBCHAPTER 6. AFFIRMATIVE ACTION PLAN FOR CONSTRUCTION CONTRACTORS AND SUBCONTRACTORS

17:27-6.2 Elements of an affirmative action plan for construction contractors and subcontractors

(a) An affirmative action plan for construction contractors and subcontractors shall consist of the following elements:

1. Provisions in the construction contract containing language required by *N.J.A.C. 17:27-[3.5 and 3.7]* **3.6 and 3.8**; or

2. (No change.)

17:27-6.3 Procedure for establishing an approved affirmative action plan by contract

(a) Upon awarding a construction contract, the public agency shall submit to the contractor for signing a contract which contains the contract language required by *N.J.A.C. 17:27-[3.5(b)]* **3.6(b)**, except that the language required by *N.J.A.C. 17:27-[3.5(b)]* **3.6(b)** shall not be included in a contract with a contractor which submits to the public agency, prior to or at the time the contract is submitted by the public agency for signing, appropriate evidence that the contractor is operating under an existing Federally approved or sanctioned affirmative action program.

(b) If a contractor refuses to sign said contract because it contains the contract language required by *N.J.A.C. 17:27-[3.5(a) and 3.7]* **3.6(a) and 3.8**, when it is submitted for signing by the public agency, then the public agency shall rescind the award and these requirements shall apply to any other contractor which the public agency selects in accordance with applicable contracting laws and procedures.

SUBCHAPTER 7. TARGETED MINORITY AND WOMEN EMPLOYMENT GOALS [OBLIGATIONS] FOR DETERMINING GOOD FAITH EQUAL EMPLOYMENT OPPORTUNITY EFFORTS BY CONSTRUCTION CONTRACTORS AND SUBCONTRACTORS

[17:27-7.2 (Reserved)]

17:27-[7.3]7.2 Establishment of **targeted** goals

(a) (No change.)

(b) The contractor shall obtain the **targeted** employment goals from the Division's website at [www.state.nj.us/treas/contract-compliance] www.state.nj.us/treasury/contract_compliance or request the employment goals from the Division after submitting the initial project workforce report to the Division.

(c) [During the initial job site meeting or first site monitoring visit, the Division representative] **When it is notified of a preconstruction or initial job meeting, the Division has the discretion to attend the meeting for the purpose of informing the construction contractor of its responsibilities, the targeted employment goals and the good faith criteria used in determining compliance with this chapter. If the Division determines not to attend the preconstruction or initial job meeting, a representative of the Division** shall discuss the [construction] contractor's [and/or subcontractor's plans for attaining] **responsibilities, the targeted** employment goals and the good faith criteria used in determining compliance with this chapter **during the first site monitoring visit.** The Division shall evaluate compliance with the **targeted** employment goals **and good faith requirements** by reviewing the utilization of minorities and women as reported in the work hours per trade and the good faith efforts of each construction contractor [or subcontractor]. The Division shall calculate the work hours per trade based upon information in the monthly project workforce report submitted pursuant to *N.J.A.C. 17:27-7.5* and verified by **periodic** site visits.

(d) (No change.)

17:27-7.3 Contractor and subcontractor compliance obligations

(a) **A construction contractor or subcontractor shall be deemed to be in compliance with the targeted employment goals pursuant to this subchapter, if the contractor or subcontractor is employing minority and women workers in the percentages established as employment goals pursuant to this subchapter, and achievement of said employment percentages shall constitute compliance for purposes of this chapter, regardless of any other percentages established by a public agency; or if the contractor or subcontractor has acted and continues to act in good faith, including the use of the procedures required by the mandatory language prescribed by *N.J.A.C. 17:27-3.7*, to achieve the targeted minority and women employment goal percentages established in accordance with this subchapter.**

(b) **The contractor or subcontractor agrees to provide documentation that it has made good faith efforts to meet equal employment opportunity requirements whenever the Division or public agency, upon its own initiative or upon the complaint of any member of the public, determines that such information is needed to determine whether the contractor or subcontractor has failed to comply with the applicable equal employment opportunity requirements.**

17:27-7.4 Criteria for determining good faith

(a) **In addition to the contractor or subcontractor's compliance with the requirements set forth in the mandatory language at *N.J.A.C. 17:27-3.7*, the Division shall consider the following factors in its determination of whether a contractor or subcontractor has acted in good faith:**

1. Whether the contractor or subcontractor has agreed to make a good faith effort to adhere to minority and female targeted employment goals;

2. Whether the contractor or subcontractor has met or documented that it has made a good faith effort to meet

targeted employment goals;

3. Whether the contractor or subcontractor has adopted an Equal Employment Opportunity (EEO) Policy;

4. Whether the contractor or subcontractor has posted an EEO Policy on the job site bulletin board;

5. Whether the contractor or subcontractor has disseminated the EEO Policy to its workers through various means including company meetings, preconstruction job meetings, written notices, etc.;

6. Whether the contractor or subcontractor has posted Federal or State issued EEO posters on the job site bulletin board;

7. Whether the contractor or subcontractor has identified an EEO Officer and established job duties in writing for such position;

8. Whether the contractor or subcontractor has developed a basic complaint procedure;

9. Whether the contractor or subcontractor has knowledge of and has considered the general availability of minorities and women having requisite skills in the immediate labor area;

10. Whether the contractor or subcontractor has knowledge of and has considered the percentage of minorities and women in the total workforce in the immediate labor area;

11. Whether, when the opportunity has presented itself, the contractor or subcontractor has considered promoting minority and women employees within its organization;

12. Whether the contractor or subcontractor attempted to hire minorities and women based upon the anticipated expansion, contraction and turnover of its workforce;

13. Whether the contractor or subcontractor has the ability to consider undertaking training as a means of making all job classifications available to minorities and women and whether it has done so;

14. Whether the contractor or subcontractor has utilized the available recruitment resources to attract minorities and women with requisite skills, including but not limited to public and private training institutions, job placement services, referral agencies, newspapers, trade papers, faith-based organizations, and community-based organizations;

15. Whether the contractor or subcontractor has requested qualified minorities and women from a labor union with whom it has an exclusive hiring or referral arrangement;

16. Whether the contractor or subcontractor has actively recruited beyond the traditional sources to attract minority and female applicants;

17. Whether the contractor or subcontractor has reviewed all personnel actions to ensure actions are taken in compliance with the company's EEO policy; and

18. Whether the contractor or subcontractor has retained records of employment and personnel actions and payroll records for a three year period from the date of the contract or project closing.

17:27-7.5 Construction project workforce reports

The Division shall provide to the public agency that has awarded a construction contract initial project workforce reports (Form AA201) to be distributed to the contractor. Each initial project workforce report shall identify the estimated employment requirements, by trade or craft, of the construction contractors and subcontractors for the duration of the construction contract. The Division shall provide construction contractors and subcontractors monthly project workforce reports that must be submitted to the public agency and the Division by the seventh business day of each month. The Division, the public agency compliance officer, construction contractors and subcontractors shall use these project workforce reports in accordance with *N.J.A.C. 17:27-[3.6]3.7*, to monitor compliance with the requirements of this subchapter, and the Division and the public agency compliance officer also may use these reports to engage in other related enforcement, compliance and reporting procedures as provided for in *N.J.A.C. 17:27-9* and 10.

SUBCHAPTER 10. COMPLIANCE PROCEDURES AND SANCTIONS, APPLICABLE TO PUBLIC WORKS CONTRACTS

17:27-10.1 Scope

(a) The provisions of this subchapter shall apply to contractors and subcontractors[,] **who are** awarded public contracts and **to** public agencies that award public contracts.

(b) The Division and those public agencies to [whom] **which** it has delegated authority in accordance with *N.J.A.C. 17:27-[3.9]3.10* have the authority to issue sanctions pursuant to this subchapter.

17:27-10.2 Alert notices for contractors and/or subcontractors

The Division or public agency compliance officer designated by a public agency who has received authority from the Division, on its own initiative or in response to an allegation from a public agency compliance officer, or in response to a written complaint or allegation from an interested party, shall investigate [the] **any** complaint or allegation of **a** violation of this chapter or of an [applicable] **approved** affirmative action plan. If the Division or public agency compliance officer designated by a public agency who has received authority from the Division determines **that** there is **a** substantial probability that a violation is occurring, it may issue a written alert notice to a contractor or subcontractor and provide a copy to the public agency. The alert notice shall explain in sufficient detail the facts of the alleged violation.

17:27-10.3 Correction of alleged violations; violation notice for contractors and/or subcontractors

If the alleged violation explained in the alert notice has not been corrected to the satisfaction of the Division or public agency compliance officer designated by a public agency who has received authority from the Division issuing the notice, within three business days after it is received by the contractor or subcontractor, said Division or public agency compliance officer designated by a public agency who has received authority from the Division shall issue a violation notice to said contractor or subcontractor. Said violation notice shall explain in sufficient detail the facts of the continuing violation.

17:27-10.4 Advisement notices for public agencies

The Division, acting on its own initiative or in response to a written complaint or allegation from an interested party, shall investigate any written complaint or allegation of a violation of this chapter by a public agency. If the Division determines **that** there is a substantial probability that a violation is occurring, it may issue an advisement letter to a public agency. The advisement letter shall explain in sufficient detail the facts of the alleged violation.

17:27-10.5 Correction of alleged public agency violations; show cause letter

(a) If the **public agency does not correct or sufficiently address to the satisfaction of the Division** the alleged public agency violation explained in the letter of advisement [has not been corrected to the satisfaction of the Division] **within 30 days of the agency's receipt of the letter of advisement**, the Division may conduct a **further** review or issue a show cause letter to said public agency [or refer the matter to the Attorney General's Office for further processing]. Said show cause letter shall explain in sufficient detail the facts of the continuing violation.

(b) Within 10 business days of receiving a show cause letter, the public agency shall submit a written statement explaining why it should not be [referred to the Attorney General's Office for further resolution] **found to have violated the Law Against Discrimination**. If the Division determines that the public agency has not adequately explained why it is not in violation **of the Law Against Discrimination** or if the Division determines that the violation **may constitute a violation of the Law Against Discrimination** and is continuing to occur, then it shall refer said public agency to the Attorney General's Office for further [enforcement] **action** consistent with N.J.S.A. 10:5-[31 et seq.]**36**.

17:27-[10.9]10.6 Enforcement; violations

(a) **The following circumstances shall constitute some of the indicia of a party's failure to meet the requirements of this chapter or of an affirmative action plan, which may form the basis for a finding of a violation by the Division. These indicia are a representative sampling of indicia, but are not intended to constitute the only indicia that may be considered by the Division in its determination as to whether a violation has occurred:**

1. For construction contractors:

i. Failure to submit Affirmative Action Form 201 (Initial Project Workforce Report);

ii. Failure to submit Affirmative Action Form 202 (Monthly Project Workforce Report);

iii. Failure to submit documentation of good faith efforts to provide equal employment opportunity in the hiring of minorities and women in each trade such as that noted at *N.J.A.C. 17:27-7.4*;

iv. Failure to provide additional requested information to determine compliance;

v. Failure to respond to an Alert or Violation Notice; or

vi. Failure to attend an investigatory conference.

2. For goods and services and professional services vendors:

i. Failure to submit affirmative action evidence (that is, Form 302 (Employee Information Report), Certificate of Employee Information Report or Letter of Federal Approval) to public agency;

ii. Failure to submit Affirmative Action Form 302 (Employee Information Report) to the Division for issuance of a Certificate of Employee Information Report;

iii. Failure to submit documentation of good faith efforts to provide equal employment opportunity in the hiring of minorities and women;

iv. Failure to submit Affirmative Action Plan; or

v. Alteration or forgery of Certificate of Employee Information Report.

3. For public agencies:

i. Failure of a State agency to pay one-half of one percent of the total cost of the construction project that is the subject of one or more construction contracts and equal to or greater than \$ 1,000,000, to the Department of Labor and Workforce Development for the outreach and training of minorities and women in the construction trades in accordance with the notice required pursuant to *N.J.A.C. 17:27-12.1*;

ii. Failure to include mandatory language in bids, advertisements, contracts or specifications;

iii. Failure to obtain affirmative action evidence from vendor/contractor;

iv. Failure to submit the Public Agency Compliance Officer (PACO) Letter or to notify the Division of changes in PACO designation;

v. Failure to cooperate fully with the Division in the establishment and implementation of guidelines for determining whether a contractor or vendor has failed to provide equal employment opportunity in the hiring of minorities and women on public contracts; or

vi. Failure to provide the Division with such other information as it shall request and as shall be necessary to enable the Division to fulfill its mission.

[(a)](b) If the Division determines that a contractor, subcontractor or public agency is in violation of this chapter or [the] **in violation of its** affirmative action plan, [it] **the Division** may enforce the obligations of *N.J.S.A. 10:5-31*[,] et seq., as implemented by this chapter, and the requirements of the affirmative action plan by ordering or taking part in any or all of the remedial actions in (a)1 through [6]4 below. A public agency acting under delegated authority may also enforce the obligations of the *N.J.S.A. 10:5-31* et seq. as implemented by this chapter and the requirement of the affirmative action plan by ordering these remedial actions except with regards to other public agencies.

1. Subject the contractor or subcontractor or public agency to a fine of up to \$ 1,000 for each violation for each day during which the violation continues, **as delineated in *N.J.A.C. 17:27-10.7*, with** said fine to be collected in a summary manner pursuant to the Penalties Enforcement Law of 1999, *N.J.S.A. 2A:58-10* et seq.;

[2. Withhold part or all of the contract or subcontract payments then due and owing;

3. Debar the contractor from all public contracts for a period of up to five years and/or until the contractor complies with the required obligations or agrees to adhere to a compliance schedule approved by the Division; provided, however, that a debarment may only be ordered after a hearing pursuant to the Administrative Procedure Act, *N.J.S.A. 52:14B-1* et seq. and the Uniform Administrative Procedure Rules, *N.J.A.C. 1:1*;

4. Terminate or suspend the construction contract; provided, however, that a contract termination or suspension may only be ordered after the Treasurer or his or her designee, who is not a member of the Division, holds a hearing for the contractor or subcontractor, and the Treasurer, or said designee, determines that a contract termination or suspension would be appropriate;]

2. Refer the record of violation to the contracting agency for corrective action as provided by statute, regulation or contract, including, but not limited to, suspension, debarment, withholding payment and termination of a contract;

[5.] **3.** Refer the record of violation determination proceeding to the Attorney General or his or her designee for [enforcement] **evaluation for** action [under] **consistent with** the "Law Against Discrimination"; and/or

[6.] **4.** (No change in text.)

17:27-10.7 Fines and penalties

(a) When the Director finds that a contractor, vendor or public agency has violated the Act or its implementing rules, the Treasurer is authorized to assess and collect fines in the amounts and time frames that follow:

1. First Violation - \$ 250.00 per day for each violation during which the violation continues.

2. Second Violation - not more than \$ 500.00 per day for each violation for each day during which the violation continues.

3. Third and Subsequent Violations - not less than \$ 500.00 per day for each violation but not more than \$ 1,000 per day for each violation.

(b) All fines and penalties shall be paid within 30 business days of the date of the final order. Failure to pay such penalties and fines shall result in a judgment being obtained in a court of competent jurisdiction.

(c) All fines shall be made payable to the Treasurer, State of New Jersey. All payments shall be made by certified check or money order, or payable in a form suitable to the Treasurer.

(d) In assessing a fine or penalty pursuant to this chapter, the Director shall consider the following factors:

1. The size of vendor/contractor's business or the population of the public agency;

2. The past history of compliance;

3. The frequency of violation for a third or subsequent violation;

4. The seriousness of the violation;

5. Indicia of good faith efforts to comply with equal employment opportunity requirements and/or affirmative action program;

6. The level of cooperation of the entity in exchanging information regarding its efforts to correct deficiencies that resulted in violation;

7. Indicia of any intentional or misleading conduct; and

8. Any other factors which the Director deems to be appropriate in determining the penalty assessed, with all such factors to be explicitly articulated by the Division in its assessment of such penalty.

(e) No fine or penalty shall be levied pursuant to this subchapter unless the Director provides the alleged violator with notification by certified mail which includes the amount of the penalty following the opportunity for an investigatory conference and the hearing process set forth in *N.J.A.C. 17:27-10.8*.

17:27-10.8 Investigatory conference; hearings

- (a) After issuing a notice of violation or show cause order, the program monitoring unit or public agency compliance officer designated by a public agency who has received authority from the Division shall provide written notice to the alleged violator that it shall submit within seven business days of receipt of such notice a written response statement explaining why it is not in violation of this chapter or the affirmative action plan or provide a detailed explanation of how it will correct any such violation and the date by which it will do so.
- (b) If the program monitoring unit or public agency compliance officer designated by a public agency who has received authority from the Division determines that the contractor or subcontractor has not adequately explained why it is not in violation or if the program monitoring unit or public agency compliance officer designated by a public agency who has received authority from the Division determines that the violation is continuing to occur, then it shall conduct an investigatory conference to determine whether there is a violation, if corrective measures must be taken and/or whether it would recommend that financial penalties should be imposed in accordance with *N.J.S.A. 10:5-35* and 36. Such investigatory conference shall be conducted within 30 business days of the contractor's and/or subcontractor's submission of its written statement. The program monitoring unit may conduct interviews and request from appropriate parties the submission of additional information as is considered necessary to determine whether the alleged violation has occurred. As soon as practicable after conclusion of the investigatory conference, the program monitoring unit shall issue an initial determination to the alleged violator.
- (c) If the alleged violator intends to appeal the initial determination, it must submit a written appeal to the Director within 10 days of receipt of the initial determination from the program monitoring unit. Any such appeal must identify the specific bases for seeking review, including all reasons that support the alleged violator's position.
- (d) The Director may disregard any appeal that is filed after the 10-day period. The Director shall resolve an appeal of the program monitoring unit's initial determination by written decision on the basis of the Director's review of the written record (including any timely submission from the alleged violator) and information obtained by the Director including, but not limited to, the violation notice, field monitoring reports, affirmative action data, pertinent standard operating procedures, administrative rules, statutes, case law and any associated information/documentation the Director deems appropriate. Such review of the written record shall, in and of itself, constitute an informal hearing.
- (e) At the discretion of the Director, the alleged violator or any other relevant party may be called upon to make an oral presentation, which may include an opportunity to submit additional documentation relevant to the issues set forth in the violation notice or show cause order. Oral presentations as convened under these rules are fact-findings for the benefit of the Director. At such oral presentations, the program monitoring unit, shall be represented by pertinent members of the Division and by the Office of the Attorney General, if required. The Director has the discretion to limit attendance at an oral presentation to those parties likely to be affected by the outcome of the appeal.
- (f) The Director, or the Director's designee from within or outside the Division, may perform a review of the written record or conduct an oral presentation directly. In the case of a review or oral presentation being handled by a hearing officer designee from outside the Division, the determination of such designee shall be in the form of a report to the Director, which shall be advisory in nature and not binding on the Director. All parties shall receive a copy of the hearing officer's report and shall have 10 business days to provide written comments or exceptions to the Director. Subsequent to the 10-business-day period for comments or exceptions, the Director shall issue an initial written decision on the matter. In the case of a review or oral presentation being handled by a designee from within the Division, the determination shall be issued by the Director, or the Director's designee.

(g) An appeal of the Division's determination may be made to the Office of Administrative Law in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

17:27-10.9 Final determination against construction contractor; aggregate rating

Upon rendering a final determination against a construction contractor, the Division shall notify the Division of Property Management and Construction of such determination and the Division of Property Management and Construction shall consider such adverse finding as a factor in determining the contractor's aggregate rating for the award of public construction contracts.

17:27-10.10 Requested meetings

A meeting with, or technical assistance provided by an official of the Division may be requested by a contractor and/or subcontractor or public agency at any time, whether or not a violation has been alleged.

SUBCHAPTER 12. TRAINING AND OUTREACH

17:27-12.1 Financing minority and women worker outreach and training programs

Annual funding for on-the-job and/or off-the-job outreach and training programs for minorities and women in the construction trades administered by the Department of Labor shall be set forth in the Appropriations Act, by statute, and/or other means permitted by law, by no later than July 1st of each year. The Director of the Division shall notify all State agencies of the funding mechanism for these programs by no later than July 15th of each year.

Recodify existing *N.J.A.C. 17:27-12.1* through *12.3* as **17:27-12.2 through 12.4** (No change in text.)

17:27-[12.4]12.5 Satisfaction of minority and women obligations

Contractors and subcontractors shall satisfy their minority and women worker outreach and training obligations by complying with the requirements of N.J.A.C. 17:27-5 and [7]12.