

NEW JERSEY ADMINISTRATIVE CODE
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TITLE 19. OTHER AGENCIES
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY
CHAPTER 39. EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION RULES

N.J.A.C. 19:39 (2016)

Title 19, Chapter 39 -- Chapter Notes

CHAPTER AUTHORITY:

P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-1 et seq.*) and P.L. 2007, c. 137 (*N.J.S.A. 52:18A-235 et seq.*, specifically 52:18A-238.k and 52:18A-240).

CHAPTER SOURCE AND EFFECTIVE DATE:

R.2015 d.106, effective May 12, 2015.

See: *47 N.J.R. 452(a)*, *47 N.J.R. 1651(c)*.

CHAPTER EXPIRATION DATE:

Chapter 39, Equal Employment Opportunity and Affirmative Action Rules, expires on May 12, 2022.

CHAPTER HISTORICAL NOTE:

Chapter 39, Affirmative Action and Set Asides in Authority-Financed School Facilities Construction Projects Financed and Contracted For by the Authority, was recodified from N.J.A.C. 19:32-5 and renamed Affirmative Action Rules by R.2007 d.380, effective December 17, 2007. As a part of R.2007 d.380, Subchapter 3, Enforcement, was adopted as new rules, effective December 17, 2007. See: *39 N.J.R. 2003(a)*, *39 N.J.R. 5369(a)*.

In accordance with N.J.S.A. 52:14B-5.1b, Chapter 39, Affirmative Action Rules, was scheduled to expire on November 14, 2014. See: *43 N.J.R. 1203(a)*.

Chapter 39, Affirmative Action Rules, was readopted as R.2015 d.106, effective May 12, 2015. As a part of R.2015 d.106, Chapter 39 was renamed Equal Employment Opportunity and Affirmative Action Rules, effective July 6, 2015. See: Source and Effective Date. See, also, section annotations.

NOTES:

Chapter Notes

TITLE 19. OTHER AGENCIES
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY
CHAPTER 39. EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION RULES
SUBCHAPTER 1. GENERAL PROVISIONS

N.J.A.C. 19:39-1.1 (2016)

§ 19:39-1.1 Purpose

The purpose of this chapter is to implement section 6 of the Act, which mandates the adoption of rules to establish and provide for the administration and enforcement of an affirmative action program for the schools construction program. In addition, this chapter implements Executive Order No. 71 (2003), which requires the Authority to set aside 25 percent of its total purchases and contracts for construction and goods and services for small business enterprises; and, in accordance with Executive Order No. 34 (2006), encourages every construction contractor and goods and services contractor to afford equal opportunity for minority- and women-owned business enterprises to participate in the purchasing and procurement opportunities available through the schools construction program.

§ 19:39-1.2 Definitions

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

"Act" means the Educational Facilities Construction and Financing Act, P.L. 2000, c. 72 (*N.J.S.A. 18A:7G-1 et seq.*), P.L. 2007, c. 137, and P.L. 2008, c. 39.

"Authority" or "SDA" means the New Jersey Schools Development Authority, established pursuant to section 3 of P.L. 2007, c. 137 (*N.J.S.A. 52:18A-235 et seq.*), the successor entity to the New Jersey Schools Construction Corporation. The Authority is statutorily charged with undertaking and funding school facilities projects, pursuant to the Act.

"Certified payroll report" means the form completed by the construction contractor awarded a contract by the Authority that indicates the race, gender and hours worked by each tradesperson during a pay period, certified by the construction contractor.

"Compliance inspector" means an employee of the Authority who is responsible for monitoring compliance with this chapter.

"Construction contract" means any contract between a firm and the Authority for the construction of a school facilities project, and includes contracts procured pursuant to *N.J.A.C. 19:36, 19:38, or 19:38B*.

"Construction contractor" means a firm that enters into or offers to enter into a construction contract with the Authority.

"Contract" means the entire and integrated agreement between a firm and the Authority.

"Division" means the Division of Public Contracts Equal Employment Opportunity Compliance established in the State of New Jersey, Department of the Treasury, or successor entity.

"Employee Information Report" means Form AA302, or successor form, which provides a breakdown of the goods and services contractor's workforce.

"Firm" means any association, company, contractor, corporation, joint stock company, limited liability company, partnership, sole proprietorship, or other business entity, including their assignees, lessees, receivers or trustees.

"Good faith" means with respect to goods and services contractors' obligations pursuant to *N.J.A.C. 19:39-2.3*, the actions set forth in *N.J.A.C. 19:39-2.3(c)*; with respect to construction contractors' obligations pursuant to *N.J.A.C. 19:39-2.4*, the actions set forth in *N.J.A.C. 19:39-2.4(b)*; and, with respect to contractors' obligations pursuant to *N.J.A.C. 19:39-2.5*, the actions set forth in *N.J.A.C. 19:39-2.6*.

"Goods and services contract" means any contract entered into by the Authority for fixtures, furnishings, equipment, and any other tangible items, and/or professional, technical, or other types of services, in accordance with *N.J.A.C. 19:38D* and/or *19:38C*. For purposes of this definition, "goods and services" shall not include construction services and materials in connection with a construction contract.

"Goods and services contractor" means a firm that enters into or offers to enter into a goods and services contract with the Authority.

"Initial Project Workforce Report" means Form AA-201, which is filed by the construction contractor and provides a projected breakdown of the number of all workers per trade and of minorities and women on a construction project.

"Minority-owned business enterprise" or "MBE" means a business that is certified as a minority-owned business enterprise by the New Jersey Department of the Treasury, Division of Revenue and Enterprise Services or successor entity.

"Minority worker" means any worker as defined by the New Jersey Department of Treasury rule *N.J.A.C. 17:27-2.1*.

"Monthly Project Workforce Report" means Form AA-202, which provides an analysis of a contractor's and its subcontractors' workforce.

"Performance evaluation" means the Act-mandated uniform performance evaluation of construction or goods and services contractors on all school facilities projects that must be utilized in reviewing bid submissions.

"SBE Form A--Schedule of Participation" or "Form A" means the form completed by the construction contractor awarded a contract by the Authority that lists all of the SBEs that will participate in the contract, including scope of work, actual dollar amount and percent of total contract to be performed.

"SBE Form B--Schedule of Participation" or "Form B" means the form completed by a goods and services contractor awarded a contract by the Authority that lists all of the SBEs that will participate in the contract, including the scope of work, actual dollar amount and percent of total contract to be performed.

"SBE Form C--Confirmation Statement of SBE Status" or "Form C" means the form completed by a proposed subcontractor or goods and services provider that has been named in a construction or goods and services contractor's Form A or Form B, respectively, which identifies the subcontractor or goods and services provider as a proposed SBE on said school facilities project, specifies the subcontract bid amount and attaches a current and valid copy of that subcontractor's or goods and services provider's SBE registration form issued by the Department of the Treasury, Division of Revenue and Enterprise Services, or successor agency.

"School construction program" means the program of school facilities projects and related activities undertaken by the SDA pursuant to the Act.

"School facilities project" means the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility and shall include fixtures, furnishings and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design professionals, such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project.

"SDA district" means a school district that received education opportunity aid or preschool expansion aid in the 2007-2008 school year, as defined at P.L. 2007, c. 260 (*N.J.S.A. 18A:7G-3*).

"Small business enterprise" or "SBE" means a business that is registered as a small business enterprise with the New Jersey Department of the Treasury, Division of Revenue and Enterprise Services, or successor entity.

"Subcontractor Projection Report" or "Form 201A" means the form completed by the construction contractor awarded a contract by the Authority that provides information concerning each of the subcontractors that will participate in the contract, including a Federal identification number and status as an MBE, WBE and/or SBE.

"Women-owned business enterprise" or "WBE" means a business that is certified as a women-owned business enterprise by the New Jersey Department of the Treasury, Division of Revenue and Enterprise Services, or successor entity.

§ 19:39-1.3 Application

This chapter applies to any firm which enters into or offers to enter into a goods and services or construction contract with the Authority.

§ 19:39-2.1 Affirmative action and small business compliance

(a) Each construction or goods and services contractor shall designate an employee who shall serve as a liaison with the Authority's compliance inspector and who shall be responsible for coordinating the firm's affirmative action program, maintaining all records required by this chapter, and submitting the forms required by this chapter through the Authority's website, or as otherwise directed, to the SDA's designated employee or representative.

(b) Every construction contractor shall complete and submit the following forms at the times specified by the SDA in the procurement or contract documents for the construction contract:

1. An SBE Form A, together with all SBE Forms C;
2. An initial project workforce report, Form AA-201;
3. A subcontractor projection report, Form AA-201A;
4. A monthly project workforce report, Form AA-202; and
5. Certified payroll reports submitted with payment invoices as specified in the contract documents.

(c) Every goods and services contractor shall submit to the Authority an SBE Form B and an SBE Form C, at the times specified by the SDA, as well as one of the following documents:

1. A Letter of approval that the contractor is operating under an existing Federally-approved or sanctioned affirmative action program;
2. A Certificate of Employee Information Report approval issued in accordance with *N.J.A.C. 17:27*; or
3. An Employee Information Report, Form AA-302.

(d) If a contractor fails to satisfy the requirements (b)1 or (c) above, as applicable, the Authority shall rescind the award of contract to the firm.

(e) A goods and services contractor shall not enter into a subcontract unless the subcontractor has submitted to said contractor one of the three documents required by (c)1 through 3 above, unless the subcontractor, for a goods and services contract, has four or fewer employees.

§ 19:39-2.2 Contract provisions

(a) All goods and services contractors shall include in every subcontract the following mandatory language concerning affirmative action employment practices:

1. The affirmative action language set forth in *N.J.A.C. 17:27-3.5(a)2i* through iv, as applicable; and
2. The employment goal compliance language set forth in *N.J.A.C. 17:27-3.7(a)1* through 4, as applicable.

(b) All construction contractors shall include in every subcontract the following mandatory language concerning affirmative action employment practices:

1. The affirmative action language set forth in *N.J.A.C. 17:27-3.6(a)2i* through iv, as applicable; and
2. The employment goal compliance language set forth in *N.J.A.C. 17:27-3.8(a)1* through 3, as applicable.

(c) Notwithstanding the mandatory subcontract language required in (b)1 above, if a subcontractor has a total workforce of four or fewer employees or is performing under an existing Federally-approved or sanctioned affirmative action program, the subcontract need only include the mandatory language set forth in *N.J.A.C. 17:27-3.6(a)2iv*.

§ 19:39-2.3 Compliance with affirmative action employment goals for minority and women workers by goods and services contractors

(a) The requirements of this section shall not apply to any goods and services contractor performing under an existing Federally approved or sanctioned affirmative action program, which is exempted from the affirmative action plan requirements under *N.J.A.C. 17:27-4.3(a)*.

(b) A goods and services contractor will be considered to be in compliance with this chapter only if the contractor has acted in good faith to employ minority and women workers in each of the equal employment occupational categories in which the contractor has employees, in accordance with the applicable county employment goals, as established by the Division in accordance with *N.J.A.C. 17:27-5.2*, as updated from time to time by the Division and posted on its website at www.state.nj.us/treasury/contract-compliance/pdf/procurement_targets.pdf.

(c) In its determination of whether a goods and services contractor has acted in good faith, the SDA shall consider whether the contractor:

1. Has knowledge of and has considered the general availability of minorities and women having requisite skills in the immediate labor area;

2. Has knowledge of and has considered the percentage of minorities and women in the total workforce in the immediate labor area;

3. When the opportunity has presented itself, has considered promoting minority and women employees within its organization;

4. Attempted to hire minorities and women based upon the anticipated expansion, contraction and turnover of its workforce;

5. 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;

6. Has utilized the available recruitment resources to attract minorities and women with requisite skills, including, but not limited to, training institutions, job placement services, referral agencies, newspapers, trade papers, faith-based organizations, and community-based organizations; and

7. Has documented its attempts to attain the applicable county employment goals.

§ 19:39-2.4 Compliance with affirmative action employment goals for minority and women workers by construction contractors

(a) A construction contractor shall make good faith efforts to employ minority and women workers in each construction trade consistent with the applicable employment goals prescribed by *N.J.A.C. 17:27-7.3*, as updated from time to time by the Division and posted at its website at www.state.nj.us/treasury/contract-compliance/goals_construction_contractors.pdf. The goals are expressed as percentages of the total hours worked on the school facilities project in each trade. The SDA will make these goals available as part of each construction contract.

(b) In determining if a contractor has acted in good faith, the SDA shall consider whether:

1. The contractor has notified the union with whom it has a collective bargaining agreement or referral arrangement, within three business days of the contract award, of the obligations of the contractor under these rules and has sought the cooperation of the union in meeting the minority and women goal requirements;

2. The contractor was able to obtain assurances at least five business days prior to commencement of construction work from the construction trade union that it would refer sufficient minority and women workers directly, consistent with the applicable county employment goal, and whether the contractor attempted to hire or schedule minority and women workers directly, and if possible, minority and women workers residing within the geographical jurisdiction of the union; and

3. The hiring or scheduling of a workforce consistent with the applicable county employment goal could be achieved for each construction trade by adhering to the procedures of (b)1 and 2 above, or whether, if the contractor has a referral agreement or arrangement with a union for a construction trade, the contractor took the following actions consistent with the applicable county employment goals:

i. Notified the SDA's compliance inspector and at least two minority and women referral organizations, a listing of which is maintained by the Division, pursuant to *N.J.A.C. 17:27-5.3*, of the contractor's labor needs, and requested referrals of minority workers and women workers;

ii. Gave notice of employment opportunities to all minority workers and women workers who were listed with the contractor as awaiting available vacancies;

iii. Employed qualified minority workers and women workers who had been listed with the contractor as candidates for available vacancies; and

iv. Notwithstanding (b)3i through iii above, the contractor shall not be required to employ women and minority advanced trainees and trainees in numbers, which result in the employment of advanced trainees and trainees as a percentage of the total workforce for the construction trade, which percentage significantly exceeds the apprentice-to-journey worker ratio specified in the applicable collective bargaining agreement, or in the absence of a collective bargaining agreement, exceeds the ratio established by practice in the area for said construction trade.

(c) The contractor shall keep complete and accurate records of all requests made for the referral of workers in any trade covered by the contract and provide those upon the request of the SDA's compliance inspector.

(d) The SDA may, in its discretion, exempt a contractor from compliance with the good faith procedures prescribed by (b)1, 2, and 3 above, as long as the SDA is satisfied that the contractor 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 employment goal established pursuant to *N.J.A.C. 17:27-7.3* and the contractor agrees to otherwise comply with the procedures set forth in this chapter.

§ 19:39-2.5 Set asides and goals for SBE contractors on school facilities projects

(a) At the time of each school facilities project advertisement, the Authority shall announce the SBE requirements for the contract, and a construction contractor or goods and services contractor shall be required to make a good faith effort to comply fully with the SBE subcontracting goals.

(b) The SDA may set aside a school facilities construction or goods and services contract for an SBE, whenever there is a reasonable expectation that bids or proposals may be obtained from at least three qualified SBE firms capable of providing the desired services. The designation shall be made prior to advertisement for bids.

(c) When practicable, the SDA will issue several smaller contracts, in place of one large contract, in order to increase the ability of SBEs to bid on school facilities projects.

§ 19:39-2.6 Good faith efforts

(a) The good faith efforts of contractors to meet the 25 percent SBE goal on school facilities projects shall include, but not be limited to, the following measures:

1. Sending solicitation letters to SBE firms registered with the Division of Revenue and Enterprise Services and to pre-qualified SBE firms on a list that is available from the SDA's website at www.njsda.gov;
2. Making follow-up telephone calls to firms solicited in (a) above, and keeping a log of such calls and responses;
3. Breaking the work into smaller subcontracts, to make it easier for SBE firms to compete;
4. Contacting community groups, including, but not limited to, groups listed by the SDA for this purpose, for assistance in identifying SBE firms;
5. Placing advertisements in local newspapers, construction trade letters, magazines, or special publications aimed at SBEs;
6. Negotiating in good faith with interested SBE subcontractors, so as not to disqualify a prospective subcontractor without good cause; and
7. Assisting potential SBE subcontractor firms by acting as a reference for the subcontractor, or by referring the subcontractor to the surety agent or bank officer of the contractor or consultant to satisfy bonding, insurance, or credit requirements.

(b) If the SDA determines that a contractor has failed to comply with its good faith obligations to meet the 25 percent SBE subcontracting goal, it may pursue any of the sanctions available pursuant to *N.J.A.C. 19:39-3.2*.

§ 19:39-3.1 Monitoring workforce affirmative action compliance and procedures

(a) A goods and services or construction contractor's employee liaison designated in accordance with *N.J.A.C. 19:39-2.1(a)* shall meet, when requested, with the SDA's compliance inspector and/or other SDA representatives to ensure compliance with this chapter and the contractor's affirmative action plan.

(b) The SDA's compliance inspector shall conduct on-site visits and/or attend project meetings and, at reasonable times and in a reasonable manner, may enter the contractor's business facility or construction project site for the purpose of determining whether the contractor is complying with its affirmative action plan and is otherwise in compliance with the procedures set forth in this chapter.

(c) The SDA's compliance inspector may investigate to determine if there is a violation of this subchapter or a contractor's affirmative action plan. If the SDA determines there is substantial probability that a violation is occurring, SDA may issue a written alert notice to a contractor. The written alert notice shall provide details of the alleged violation.

(d) If the alleged violation explained in the alert notice has not been corrected within three business days after the alert notice is received by the contractor, the SDA shall issue a violation notice to the contractor. Said violation notice shall provide details of the continuing violation.

(e) After SDA's issuance of a notice of violation, the alleged violator shall submit, within seven business days, a written statement explaining why it is not in violation of this subchapter or the affirmative action plan or an explanation of how it will correct any such violation. SDA shall review the written statement, and if the SDA determines that the violator has not adequately explained why it is not in violation or determines that the violation is continuing to occur, then SDA shall conduct an investigatory conference to determine whether there is a violation and/or if corrective measures must be taken. The conference may also be conducted to discuss and resolve issues before taking any action pursuant to *N.J.A.C. 19:39-3.2*. Such investigatory conference shall be conducted within 30 business days of the contractor's submission of its written statement. The conference may involve interviews of relevant parties and SDA may request from appropriate parties the submission of additional information as is considered necessary to determine whether the alleged violation has occurred.

§ 19:39-3.2 Sanctions

(a) If the SDA determines that either a goods and services or construction contractor is in violation of this chapter or its affirmative action plan, SDA shall enforce the obligations of this chapter and the requirements of the affirmative action plan by any or all of the following actions:

1. Reduce the contractor's performance evaluation;
2. Reduce the contractor's project rating on subsequent bid proposals;
3. Reduce the contractor's compensation by a maximum of one and one-half percent of the contract price if the contractor is found not to have in good faith satisfied the hiring requirements set forth in the contract, because the SDA cannot and will not pay for contractual services that are not performed or contractual obligations that are not met. This reduction in the contract price may be effectuated either by the withholding of all or part of future payments to the contractor or by a reduction in the amount of retainage otherwise due for release to the contractor under the contract;
4. Pursue any of the sanctions available under N.J.A.C. 19:38A-4, including revocation of the firm's pre-qualification and/or suspension or debarment from SDA contracting; and/or
5. Terminate the contract.

§ 19:39-4.1 Subcontractor replacement on school facilities projects

(a) A construction or goods and services contractor shall not replace an SBE subcontractor, except where such contractor is in breach of its subcontract and the SDA has provided the contractor its prior written consent to the replacement.

(b) A request for replacement shall be in writing, with complete justification for the request. The contractor must have the written approval of the SDA before such a replacement can be made, regardless of the reason for the replacement.

(c) The contractor shall make a good faith effort to find another SBE to perform at least the same amount of work as had been allocated to the original SBE subcontractor.

§ 19:39-5.1 Training programs

(a) Pursuant to P.L. 2009, c. 313 (*N.J.S.A. 52:38-7*), the SDA shall allocate one half of one percent of capital funds for approved school facilities projects to fund training and scholarship programs for minority group members and women in preparation for construction trade occupations or other occupations, including engineering and construction management professions, that are pertinent to construction, design, and management of school facilities projects.

(b) The SDA shall utilize the funds pursuant to (a) above to work with the State Higher Education Student Assistance Authority to develop a targeted scholarship program for New Jersey women and minority group members, directed toward fields of study relevant to occupations pertinent to school facilities project construction, management, and design, to increase the numbers of women and minorities in the State's construction trades and related professions.

(c) The SDA shall further utilize the funds pursuant to (a) above to create an SBE/WBE/MBE training program to assist existing New Jersey SBE/WBE/MBE entities in trades or professions related to school facilities project design, management, and construction to further develop their business practices, become familiar with SDA contracting and procurement requirements, and to secure SDA prequalification to participate in SDA procurements.

(d) To the extent practicable, the services provided pursuant to this section shall be coordinated with apprenticeship training provided under N.J.S.A. 18A:7G-38.