

STATE AGENCY PROCEDURES FOR BEST PRACTICES IN ADMINISTRATION OF FEDERAL STIMULUS FUNDS

Background

May 7, 2010

The Division of Human Rights (“Division” or “DHR”) serves as the “centralized civil rights monitoring unit” for federal ARRA stimulus programs under Governor Paterson’s Executive Order 31. The Executive Order, charges the Division to:

develop and recommend to the Governor policies, procedures and practices for monitoring and reporting actions concerning stimulus programs, projects and funds (§6); and

implement the goals of (a) enhancing “accountability by providing a uniform, basic framework for collecting minimal but critical data that can be monitored, and using that data to enforce compliance, by contracting agencies in a decentralized fashion”; and (b) providing transparency of the activities and data to taxpayers” (5th Whereas clause).

DHR’s Role and Best Practices

In order to enhance the effective enforcement of civil rights laws in ARRA spending, the Division developed the following “best practices” to be adopted and implemented by state agencies administering ARRA funds. DHR developed these practices based on meetings with state agencies to learn their procedures and circulation of a draft for comments that were considered and, where appropriate, adopted. The Division does not substitute itself for the state agencies that remain accountable for monitoring and enforcement of stimulus funds that they administer, but rather works collaboratively with agency personnel primarily responsible for assuring civil rights compliance and auditing for stimulus contracts. To the extent that a particular agency may legitimately require modification of the application of these practices, based upon a requirement of or conflict (not just adding other data elements to be reported) with federal or state law, which modification would not frustrate the purposes of these practices, the Division will resolve such issue on a case by case basis. DHR will meet with the state agencies in the groups designated by the Economic Recovery and Reinvestment Cabinet and resolve the issues they have raised in the areas of amending contracts, collecting demographic data and reporting such data.¹

¹ First, with agencies determine

- (a) whether agency is covered under Executive Order;
- (b) whether agency is covered under Article 15-A;
- (c) whether agency is federal contractor under Executive Order 11246;
- (d) whether agency is covered under M/WBE;
- (e) whether agency is covered under federal DBE;
- (f) whether ARRA programs require prevailing wages;
- (g) what demographic data is reported by what means currently;

The reporting resulting from these practices will also play an important role in providing public information and a means by which civic organizations, advocacy groups and New Yorkers can track the funds, identify specific "deliverables" or promised "outcomes" – such as whether projected jobs have been created; the amount of dollars allocated to job development and training, affirmative action and M/W/DBE goals; and concrete information about apprenticeship or pre-apprenticeship programs.

The goals of these practices, therefore, are to use existing state resources and compliance procedures that are or should already be in place pursuant to Executive Law Article 15-a for agencies that give out state contracts (particularly those procedures in II.A.1.-2., II.B.1.-2., IIIA.1-2. and III.B.1.-2. below). Effective use of these with the reasonable additions set forth below will help to achieve the accountability, data collection, monitoring, compliance and transparency required by the Executive Order to “advance the purposes of the ARRA, enhance public confidence and promote economic recovery.” (5th Whereas clause)).

I. STATE AGENCIES

Each contracting/granting State agency must develop and implement written plans and procedures (which can use existing contract compliance and civil rights procedures with additional elements for stimulus reporting) for:

A. Deciding upon applications or proposals.² These should require the agency to develop and implement:

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- (h) what present auditing, including site visits, can be used for collection, reporting and monitoring;
 - (i) what contractual clauses permit additional reporting without requiring amendment and whether amendment of contracts is necessary.

Second, in conjunction with identified computer resource, determine most effective way that currently collected demographic data can be transferred or input into uniform state-wide reports; if no current collection, determine most effective way to have recipients gather and transmit data.

Third, DHR and the identified computer resource will work out reporting issues with agencies IT departments, test and begin implementing reporting (*see* below at _10-11).

² These apply to future contracts, grants and awards. To the extent contracts, grants or awards are already executed and unless the agency can demonstrate that amending or reopening them would conflict (not just adding other data elements to be reported) with federal or state law, the agency must modify and require recipients and sub-recipients to comply in order to receive future payments. As used herein, “recipients” means entities that receive federal stimulus funds through transfers of funds , contracts, grants or awards from State agencies that receive, administer or pass through federal stimulus funds;

1. standards to (a) approve or deny applications and submissions, including checks for prior civil rights compliance issues, audits and complaints as part of vendor responsibility; (b) approve or deny waivers of M/WBE, DBE or other goals, including that goals are not to be reduced in order to avoid giving waivers; and (c) require recipients and sub-recipients to report the foregoing information as part of vendor responsibility submissions with applications;
2. availability levels and goals for workforce, M/WBE or DBE participation, and description of how these are set;
3. requirements that recipients and sub-recipients submit proposed workforce plans (*see* IIA.1., III.A.1. below) and workforce utilization reports (*see* IIA.2., III.A.2. below);
4. requirements that recipients and sub-recipients submit description of recruitment to be undertaken (affirmative action, NYS job bank, union apprenticeship program);
5. requirements that recipients and sub-recipients submit M/W/DBE utilization plans with goals (*see* II.B.1., III.B.1. below) and participation reports (*see* II.B.2., III.B.2. below);
6. requirements that recipients and sub-recipients designate a senior level officer responsible for plans, reports and compliance;
7. procedures for ongoing reporting and monitoring of performance, deficiencies and disparities, and for audits, compliance reviews and corrective action;
8. procedures for taking corrective action to achieve compliance;

recipients include contractors, prime contractors and vendors for such State agencies; recipients either use the funds themselves and/or distribute them to sub-recipients. “Sub-recipients” means entities that receive federal stimulus funds from recipients, and includes sub-contractors, sub-grantees and vendors for recipients. DHR will identify with each agency the entities that are recipients and sub-recipients to resolve differences in terms used herein and used in ARRA documentation.

9. use of available software (through CSCIC or other state agency)³ for data reporting, collection and analysis of data required to be reported (*see* II.A.-B., III.A.-B. below). Depending upon the volume of data and on-line storage capacity, data should be available on the state's stimulus or agency websites or through other means that is accessible to the public on-line and searchable by geographic area, recipient name and contract amount. Alternatively, data should be available through expedited agency FOIL procedures, which the agency shall implement in a manner to provide timely and full disclosure of requested information.

10. provision of technical assistance to recipients and sub-recipients.

11. keeping and filing of all records and documentation required herein in electronic form, or explanation of why electronic form cannot be maintained.

B. Monitoring and reporting compliance with applicable civil rights laws and regulations and the above requirements, including identification of contracts and sub-contracts, waivers, recipients and sub-recipients, and prior compliance information as to each.

C. Requiring recipients and sub-recipients to certify to and satisfy the following (*see also* II.D. and III.D. below) before contract is approved and payments are made, including providing required documentation. Agencies must add clauses to existing and future contracts that, by submission of a proposal, contract execution, or request for or receipt of payment, the recipient or sub-recipient agrees to and will comply with the following terms and conditions:

a. certify and comply with all applicable civil rights laws and regulations, Article 15-a and ESDC M/WBE or DBE requirements, and create a LEP plan;

b. certify and comply with all requirements of federal Executive Order 11246, if applicable, including maintaining an affirmative action plan;

c. certify and make every good faith effort to promote equality of economic opportunities for minority group members, women and disabled persons, and facilitate minority, women and disadvantaged business entities participation on all contracts and subcontracts;

³ Recipients and sub-recipients should report as required through web-based submissions to be developed on Excel spreadsheets, from which data may be aggregated or sorted and then linked to stimulus projects mapped on www.recoveryny.gov. Data will be available for inspection and analysis by agencies and the public. CSCIC or another agency (e.g., the State Data Center), in cooperation with computer/GIS resources to be added to DHR, should map stimulus projects overlaid with indicators of economic need or distress (population density and unemployment and poverty rates, etc.) to measure the impact and fair distribution of projects.

d. certify and hold all sub-recipients to compliance and reporting requirements;

e. certify its knowledge of hours worked and employment status of employees reported;

f. provide certified payrolls where required by federal or state prevailing wage requirements;

g. certify and retain documentation that M/W/DBE entities employed are certified by ESDC or other appropriate agency;

h. make certifications under penalty or perjury and for the purpose of obtaining payment under the contract or subcontract;

i. retain detailed supporting documentation in electronic form (or explain why electronic form cannot be maintained), records of expenditures of stimulus funds and compliance with applicable civil rights laws, regulations and requirements herein;

j. permit examination, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general of all relevant records and transactions relating to the contract or subcontract; and

k. permit entry, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general and make personnel available for interviews.

D. Taking corrective action and/or imposing penalties on recipients and sub-recipients for non-compliance.

E. Providing quarterly (co-ordinated with ARRA §1512 reporting) reports to DHR, the Panel and the Cabinet on compliance and corrective action activities and certification to the Comptroller when requesting disbursement of payments that the agency is complying with the requirements herein.

F. Reporting the numbers of jobs created or retained pursuant to ARRA §1512, with the additional information of the numbers of persons employed,⁴ by race, national origin/ethnicity, sex, disability status and zip code of residence (*see* II.A.3. and III.A.3. below).

⁴ The numbers of jobs and the numbers of persons employed may be different because §1512 requires conversion into full-time equivalents and different federal agencies may have different procedures for calculating FTEs.

II. RECIPIENTS

Each recipient, as evidence of compliance necessary for contract approval and payments, must:

A.1. Submit proposed workforce (for the particular project) staffing plan (e.g., OGS Form EEO 100-G, MTA Staffing Plan) for employees in project jobs for recipients and sub-recipients, including availability and goals;⁵ submitted with proposal or within reasonable time after award of contract or effective date of these requirements.

2. Submit quarterly (co-ordinated with ARRA §1512 reporting) workforce utilization reports of employees in project jobs separately for recipients and sub-recipients (e.g., OGS Form EEO 101-G, DOT Forms AAP 33 and 35, MTA Form 257, and Ex. A), with comparison to and variances from availability and goals (*see* n.4 above).

3. Report demographics of employees who received or retained jobs, including race, national origin/ethnicity, sex, disability status and zip code of residence. This information should be reported for all persons on funded activities, including those employees on certified payrolls.

4. Specify and take steps to correct underutilization, and state results of corrective action for prior reported underutilization.

B.1. Submit M/W/DBE utilization plan (e.g., OGS Form M/WBE 100-G, DOT Form AAP 19, MTA Form 15A.1, with availability and goals)⁶ or waiver application (e.g., OGS Form M/WBE 101-G).

2. Submit quarterly (co-ordinated with ARRA §1512 reporting) M/W/DBE participation reports (e.g., OGS Form M/WBE 102, DOT Form EEO 102-G, MTA Form 15A.3), with comparison to and variances from availability and goals.

3. specify and take steps to correct underutilization, and state results of corrective action for prior reported underutilization.

⁵ Recipients that are required under Executive Order 11246 or other regulation or order to have an affirmative action plan and to determine workforce availability of minority and women workers in order to compare to their employees, should in their stimulus utilization reports provide such comparison, explain variances and take corrective action. For other recipients that are not so required, the mapping agency (*see* n.2 above) can compare availability data to recipient workforce utilization data.

⁶ Obtain from Empire State Development Corporation Division of Minority and Women-Owned Business Development.

C. Monitor compliance and compliance of sub-recipients with applicable civil rights laws and regulations, and compliance with workforce utilization and M/W/DBE plans

D. By submission of a proposal, contract execution, or request for or receipt of payment, the recipient agrees to and will comply with the following terms and conditions:

a. certify and comply with all applicable civil rights laws and regulations, Article 15-a and ESDC M/WBE or DBE requirements, and create a LEP plan;

b. certify and comply with all requirements of federal Executive Order 11246, if applicable, including maintaining an affirmative action plan;

c. certify and make every good faith effort to promote equality of economic opportunities for minority group members, women and disabled persons, and facilitate minority, women and disadvantaged business entities participation on all contracts and subcontracts;

d. certify and hold all sub-recipients to compliance and reporting requirements;

e. certify its knowledge of hours worked and employment status of employees reported;

f. provide certified payrolls where required by federal or state prevailing wage requirements;

g. certify and retain documentation that M/W/DBE entities employed are certified by ESDC or other appropriate agency;

h. make certifications under penalty of perjury and for the purpose of obtaining payment under the contract or subcontract;

i. retain detailed supporting documentation in electronic form (or explain why electronic form cannot be maintained), records of expenditures of stimulus funds and compliance with applicable civil rights laws, regulations and requirements herein;

j. permit examination, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general of all relevant records and transaction relating to the contract or subcontract; and

k. permit entry, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general and make personnel available for interviews.

III. SUB-RECIPIENTS

Each sub-recipient as evidence of compliance necessary for contract approval and payments, must:

A.1. Submit proposed workforce (for the particular project) staffing plan (e.g., OGS Form EEO 100-G, MTA Staffing Plan) for employees in project jobs, including availability and goals;⁷ submitted with proposal or within reasonable time after award of contract or effective date of these requirements.

2. Submit quarterly (co-ordinated with ARRA §1512 reporting) workforce utilization reports of employees in project jobs (e.g., OGS Form EEO 101-G, DOT Forms AAP 33 and 35, MTA Form 257, and Ex. A), with comparison to and variances from availability and goals (*see* n.6 above).

3. Report demographics of employees who received or retained jobs, including race, national origin/ethnicity, sex, disability status and zip code of residence. This information should be reported for all persons on funded activities, including those employees on certified payrolls.

4. Specify and take steps to correct underutilization, and state results of corrective action for prior reported underutilization.

B.1. Submit M/W/DBE utilization plan (e.g., OGS Form M/WBE 100-G, DOT Form AAP 19, MTA Form 15A.1, with availability and goals)⁸ or waiver application (e.g., OGS Form M/WBE 101-G).

2. Submit quarterly (co-ordinated with ARRA §1512 reporting) M/W/DBE participation reports (e.g., OGS Form M/WBE 102, DOT Form EEO 102-G, MTA Form 15A.3), with comparison to and variances from availability and goals.

3. Specify and take steps to correct underutilization, and state results of corrective action for prior reported underutilization.

⁷ Sub-recipients that are required under Executive Order 11246 or other regulation or order to have an affirmative action plan and to determine workforce availability of minority and women workers in order to compare to their employees, should in their stimulus utilization reports provide such comparison, explain variances and take corrective action. For other sub-recipients that are not so required, the mapping agency (*see* n.2 above) can compare availability data to sub-recipient workforce utilization data.

⁸ Obtain from Empire State Development Corporation Division of Minority and Women-Owned Business Development.

C. Monitor compliance and compliance of sub-recipients with applicable civil rights laws and regulations, and compliance with workforce utilization and M/W/DBE plans

D. By submission of a proposal, contract execution, or request for or receipt of payment, the recipient agrees to and will comply with the following terms and conditions:

a. certify and comply with all applicable civil rights laws and regulations, Article 15-a and ESDC M/WBE or DBE requirements, and create a LEP plan;

b. certify and comply with all requirements of federal Executive Order 11246, if applicable, including maintaining an affirmative action plan;

c. certify and make every good faith effort to promote equality of economic opportunities for minority group members, women and disabled persons, and facilitate minority, women and disadvantaged business entities participation on all contracts and subcontracts;

d. certify and hold all sub-recipients to compliance and reporting requirements;

e. certify its knowledge of hours worked and employment status of employees reported;

f. provide certified payrolls where required by federal or state prevailing wage requirements;

g. certify and retain documentation that M/W/DBE entities employed are certified by ESDC or other appropriate agency;

h. make certifications under penalty of perjury and for the purpose of obtaining payment under the contract or subcontract;

i. retain detailed supporting documentation in electronic form (or explain why electronic form cannot be maintained), records of expenditures of stimulus funds and compliance with applicable civil rights laws, regulations and requirements herein;

j. permit examination, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general of all relevant records and transactions relating to the contract or subcontract; and

k. permit entry, upon request and without notice, by the Stimulus Oversight Panel, state contracting agency and inspectors general and make personnel available for interviews.

[Exhibit A – Stimulus Recipient Workforce Utilization Report]

1. We will meet with each agency/group of agencies and accomplish the following:

a. determine applicability of Executive Order 31 to agency and stimulus projects, resolve any other “jurisdictional” issues and consult with Governor’s Counsel if necessary

b. identify recipients and sub-recipients using ARRA nomenclature so that it is clear who is subject to Best Practices reporting

c. identify stimulus projects and contracts that are subject to Article 15-A, M/WBE, DBE, federal contractor Executive Order 11246, federal Davis-Bacon or state prevailing wage, and other civil rights laws

d. determine if any and what contracts might need to be amended to permit data collection and reporting

e. determine what workforce data (for recipients and sub-recipients) is being collected for identified projects and contracts

i. responsibility for data collection and reporting

ii. how collected and reported

(a) paper, site inspection, electronic or other

(b) software used: Excel, Access, Skyline, EBO, or

other

iii. how is data aggregated (same information as ii.)

iv. how is data reported, to whom and for what purpose (same information as ii.)

v. determine if data analyzed or monitored (same information as ii.)

f. determine what changes will need to be made to existing collection and reporting, or what new system will have to be started, to comply with uniform state-wide stimulus collection and reporting

- i. interface, or transfer data from, existing collection and reporting system to uniform state-wide system
- ii. collect and transfer data elements required in Exhibit A⁹
- iii. begin and test with current periods in current contracts
- iv. determine what will be necessary to capture data for prior periods of stimulus contracts
- g. determine what is necessary for monitoring
 - i. identify changes in workforce between reporting periods
 - ii. identify variances from proposed staffing plans
 - iii. identify variances from available labor pools
 - iv. identify person responsible for monitoring
 - v. develop procedures for review and acting upon variances, changes and complaints

⁹ The Department of Civil Service is authorized to collect ethnic/race information on employees pursuant to Title VII of the Civil Rights Act of 1964, as amended, and must report on the ethnic/race composition of the workforce biannually to the EEOC on form EEO-4. To meet the ethnic/race gathering and reporting requirements, the State follows EEOC guidance. First, agencies ask new employees to voluntarily self-identify their ethnicity/race to the Department of Civil Service. Where employees choose not to self-identify, we instruct the agency affirmative action officer to follow up and ask the employee to self-identify. Then, if the employee still chooses not to self-identify, the affirmative action officer is asked to do a visual identification and provide Civil Service the ethnic/race information. This process results in some employees' ethnicity/race being unknown for periods of time (especially employees who work in part-time positions, night or weekend shifts, or remote locations). Diversity in the New York State Government Workforce, June 2009, p. 35, available at <http://www.cs.state.ny.us/pio/diversity.pdf>.