

PART 252

SERVICE-DISABLED VETERAN-OWNED-BUSINESS ENTERPRISE PROGRAM

(Statutory authority: Executive Law, §§ 200, 369-i[5])

Sec.

252.1 Definitions.

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252.3 Statewide Certification Program - Purpose, scope and applicability.

§ 252.1 Definitions.

(a) *Administering agency* shall mean the Office of General Services Division of Service-Disabled Veterans' Business Development (DSDVBD).

(b) *Applicant* shall mean a business enterprise which has applied for certification as a bona fide service-disabled veteran-owned business enterprise.

(c) *Business enterprise* shall mean any entity, including a sole proprietorship, partnership, limited liability partnership, limited liability company or corporation, including not-for-profit corporations, which is authorized to and engages in lawful business transactions in accordance with New York law.

(d) *Certified enterprise* or *certified business* shall mean a business enterprise which has been approved by the division of service-disabled veteran business development of service-disabled veteran-owned business enterprise status subsequent to verification that the business enterprise is owned, operated, and controlled by service-disabled veterans, and is a small business pursuant to subdivision (v) of this section.

(e) *Certified service-disabled veteran-owned business enterprise* shall mean a business enterprise, including a sole proprietorship, partnership, limited liability company or corporation, including not-for-profit corporations that is:

- (1) at least 51 percent owned by one or more service-disabled veterans;
- (2) an enterprise in which such service-disabled veteran ownership is real, substantial, and continuing;
- (3) an enterprise in which such service-disabled veteran ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise;
- (4) an enterprise authorized to do business in this State and is independently-owned and operated;

(5) an enterprise that is a small business as defined herein; and

(6) certified by the Office of General Services.

(f) *Commercially useful function.* A service-disabled veteran-owned business enterprise performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, a service-disabled veteran-owned business enterprise must, where applicable and in accordance with any State agency specifications, also be responsible, with respect to materials and supplies used on the contract, for ordering and negotiating price, determining quality and quantity and installing. A service-disabled veteran-owned business enterprise does not perform a commercially useful function if its role adds no substantive value and is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation. Factors to be used in assessing whether a service-disabled veteran-owned business is performing a commercially useful function include:

(1) the amount of work subcontracted;

(2) industry practices;

(3) whether the amount the service-disabled veteran-owned business enterprise is to be paid under the contract is commensurate with the work it is to perform;

(4) the credit claimed towards service-disabled veteran-owned business enterprise utilization goals for the performance of the work by the service-disabled veteran-owned business enterprise; and

(5) any other relevant factors.

(g) *Commissioner* shall mean the Commissioner of General Services.

(h) For purposes of this Part, *contract scope of work* shall mean the scope of work set forth in the State contract including, but not limited to, construction, construction services, non-construction services, technology, commodities, products or other deliverables required by such contract and specific tasks required by such contract.

(i) *Contracting agency* shall mean the State agency that is a party to a State contract, as defined in subdivision (w) of this section.

(j) *Contracting categories.* Major procurement categories for which State agencies shall establish a master goal plan or, where applicable, an update to the master goal plan, as defined in section 252.2(a) and (b), respectively of this Part, to promote the participation of certified service-disabled veteran-owned business enterprises.

(k) *Contractor*. An individual, a business enterprise, a not-for-profit corporation, or any other party to a State contract, or a bidder in conjunction with the award of a State contract or a proposed party to a State contract.

(l) *Control* shall mean service-disabled veteran-owned business enterprises and/or their managers have expertise specifically in the business's field of operation in controlling the overall destiny and in controlling the day-to-day operations of the business enterprise.

(m) *Day* shall mean a State business day unless otherwise specified.

(n) *Directory* shall mean the directory of certified service-disabled veteran-owned business enterprises for use by State agencies and contractors in complying with the provisions of article 17-B of the Executive Law.

(o) *Director* shall mean the Director of the Division of Service-Disabled Veterans' Business Development in the Office of General Services.

(p) *Goal* shall mean the percentage of aggregate agency expenditures targeted for the participation of certified service-disabled veteran-owned business enterprises sought to be included in State procurement opportunities as prime contractors, subcontractors, suppliers, consultants, joint ventures, teaming agreements, or other similar arrangements.

(q) *Not dominant in its field* shall mean a business enterprise which does not exercise a controlling influence on an industry in its field of operation.

(r) *OGS* shall mean the Office of General Services.

(s) *Service-disabled veteran* shall mean:

(1) in the case of the United States Army, Navy, Air Force, Marines, Coast Guard, Army National Guard or Air National Guard and/or Reserves thereof, a veteran who received a compensation rating of ten percent or greater from the United States Department of Veterans Affairs or from the United States Department of Defense because of a service-connected disability incurred in the line of duty; and

(2) in the case of the New York guard or the New York naval militia and/or reserves thereof, a veteran who is certified by the New York State Division of Veterans' Affairs, pursuant to the appropriate provisions contained within the Code of Federal Regulations, as having incurred an injury equivalent to a compensation rating of ten percent or greater from the United States Department of Veterans Affairs or from the United States Department of Defense because of a service-connected disability incurred in the line of duty.

(t) *Set aside* shall mean the reservation in whole or in part of certain procurements by State agencies subject to guidelines to be issued by the commissioner regarding discretionary

purchasing, bidding where more than one certified service-disabled veteran-owned business can provide the construction, construction services, non-construction services, technology, commodities, products and other classifications that will facilitate meeting the goal and meeting state agencies' form, function and utility.

(u) *Significant business presence* shall mean a business authorized to do business in New York State, and that makes a contribution to the New York State economy through the payment of taxes, or the purchase of made in New York State construction, construction services, non-construction services, technology, commodities or products or that has any payroll in New York State.

(v) *Small business* shall mean a business enterprise which has a significant business presence in the state, not dominant in its field and employs, based on its industry, a certain number of persons as determined by the director, but not to exceed 300, taking into consideration factors which include, but are not limited to, Federal small business administration standards pursuant to 13 CFR part 121 and any amendments thereto.

(w) *State agency* shall mean:

(1) any State department; or

(2) any division, board, commission or bureau of any State department; or

(3) the State University of New York and the City University of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the State; or

(4) a board, a majority of whose members are appointed by the governor or who serve by virtue of being State officers or employees as defined in subparagraph (i), (ii) or (iii) of paragraph (i) of subdivision one of section 73 of the Public Officers Law. A *State authority*, as defined in subdivision one of section two of the Public Authorities Law, and certain public entities listed in subsection b of subdivision 11 of section 310 of the Executive Law except the following only to the extent of State contracts entered into for its own account or for the benefit of a State agency as defined in paragraph (1) or (2) of this subdivision: Dormitory Authority of the State of New York; Facilities Development Corporation; New York State Energy Research and Development Authority; New York State Science and Technology Foundation.

(x) *State contract* shall mean:

(1) a written agreement or purchase order instrument, providing for a total expenditure in excess of \$25,000, whereby a contracting agency is committed to expend or does expend funds in return for labor, services including but not limited to legal, financial and other

professional services, commodities, supplies, equipment, materials, technology or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;

(2) a written agreement in excess of \$100,000 whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon; and

(3) a written agreement in excess of \$100,000 whereby the owner of a State assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project.

(y) *Unconditional ownership* shall mean ownership that is not limited by conditions precedent, conditions subsequent, executory agreements, voting trusts, restriction on or assignments of voting rights, or other arrangements of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another.

(z) *Veteran* shall mean a person who served in and who has received an honorable or general discharge from, the United States Army, Navy, Air Force, Marines, Coast Guard, and/or Reserves thereof, and/or in the Army National Guard, Air National Guard, New York Guard and/or the New York Naval Militia.

§ 252.2 State agency responsibilities: purpose, scope and applicability.

The purpose of this section is to establish standards, criteria, and procedures by which State agencies set annual goals for direct and indirect contracting opportunities with certified service-disabled veteran-owned business enterprises, and the processes by which these master goal plans are submitted, including what information needs to be reported, and procedures and consequences for State agencies that fail to meet their goals without a good faith effort to maximize contractual opportunities for certified enterprises.

(a) *Annual State agency-specific goals.* (1) Each State agency shall develop and adopt agency-specific goals in accordance with article 17-B of the Executive Law. Such agency specific goals shall be in addition to goals established pursuant to article 15-A of the Executive Law with respect to procurements from certified minority owned and women owned business enterprises.

(2) Agency-specific goals shall be reflected in the State agency's master goal plan and any subsequent updates to the master goal plan for the inclusion of certified service-disabled veteran-owned business enterprises with justifications for such goals.

(3) Agency-specific goals shall be set upon a review of the scope, character and relevant expenditures associated with the State contracts that are expected to be let or performed during the relevant fiscal year and shall be based on specific factors concerning said State contracts, which shall include, where applicable, the following:

(i) statewide availability of service-disabled veteran-owned business enterprises for construction, construction services, non-construction services, technology, commodities or products;

(ii) the availability of certified service-disabled veteran-owned business enterprises for the State agency's State contracts found in the Directory of Service-Disabled Veteran-Owned Businesses maintained by the Office of General Services;

(iii) the geographic location(s) of the performance of the State agency's contracts;

(iv) the extent to which geography is material to the performance of the State contract and the ability of certified service-disabled veteran-owned business enterprises that are located outside of the geographic location(s) to perform on State contracts notwithstanding their location; and

(v) such other factors as the State agency can specifically delineate and justify with supporting facts and documentation.

(4) Agency-specific goals shall be established on a State fiscal year basis or, where the State agency operates on a different fiscal year and upon the approval of the director, the State agency's fiscal year.

(b) *Master goal plan.* (1) Each State agency is responsible for and required to have a master goal plan on file with DSDVBD.

(2) In the event a State agency is deficient with regard to the requirement set forth in this subdivision, the subject State agency shall take affirmative measures to submit a master goal plan to DSDVBD within 30 days of receipt of a written notice of such a deficiency.

(3) Such master goal plan shall include the following:

(i) agency-specific goals set pursuant to this section for service-disabled veteran-owned business enterprises;

(ii) agency-specific goals expressed as a percentage of aggregate agency expenditures, specifically including each of the following contracting categories, or in limited circumstances due to administrative necessity, other such categories established by the director:

(a) construction;

- (b) construction related services;
- (c) non-construction related services;
- (d) technology; and
- (e) commodities;

(iii) a description of any practices, procedures, strategies or actions, in addition to those referenced in these regulations, that may be implemented by the agency to ensure participation by certified service-disabled veteran-owned business enterprises in State contracts;

(iv) a list of personnel responsible for the implementation of article 17-B of the Executive Law;

(v) any other applicable appropriation and expenditure which may not be subject to goals, but that the State agency deems relevant or necessary to the promotion and participation of service-disabled veteran-owned business enterprises in state procurement; and

(vi) such other information that a State agency deems relevant or necessary to its master goal plan.

(5) The master goal plan shall be the basis for each State agency's prospective efforts, practices and procedures to reasonably achieve the participation of service-disabled veteran-owned business enterprises in the State agency's procurement.

(c) *State agency master goal plan submission procedures.* (1) All State agencies subject to article 17-B of the Executive Law shall submit and/or have an active master goal plan in force and on file with DSDVBD.

(2) Each State agency shall submit a master goal plan or an update to the master goal plan, pursuant to this section, to the director on or before January 15th of each year, or at such time determined by the director in such form as may be required by the director.

(3) In instances where a State agency has a master goal plan on file with DSDVBD and such State agency is in good standing with DSDVBD regarding its good faith efforts to meet its agency-specific goals as outlined therein, the director may, at his or her discretion, permit a State agency to submit an update to the master goal plan in lieu of a submission of a new master goal plan. Notwithstanding the foregoing, a new master goal plan must be submitted to the division by each State agency a minimum of once every five years.

(d) *State agency master goal plan review.* (1) The director shall review the agency master goal plan to determine:

(i) whether the goals within the plan are reasonable and reflective of a process that has employed an assessment of the agency's total procurement portfolio as it relates to the participation of service-disabled veteran-owned business enterprises in agency contracts;

(ii) whether the factual basis and supporting documentation for such goals comport with the requirements set forth in this section;

(iii) whether the goals set by the State agency adequately reflect the availability of certified service-disabled veteran-owned business enterprises for the agency's contracts; and

(iv) whether other factors raised in the master goal plan have a legitimate substantive impact on the goals set by the State agency.

(2) Following the submission of a master goal plan by a State agency and review of such a master goal plan by the director, the director shall provide written notice of the acceptance or rejection of the master goal plan and if the plan is rejected, the agency shall revise and resubmit its plan which shall address any input provided by the director.

(3) A State agency shall resubmit its master goal plan within 30 days of receipt of a notice of rejection incorporating revisions and recommended modifications or stating any reasons why modifications recommended by the director cannot be incorporated in the State agency's master goal plan.

(4) Updates to the master goal plan submitted by a State agency shall be subject to the same provisions, contained within this section, that govern the review of master goal plans.

(e) *State agency compliance reporting.* Each State agency shall cooperate and submit information in the timeframe requested by OGS to include in an annual report to be submitted by December 31st each year. Information to be provided shall include, but not be limited to, number of contracts entered into pursuant to article 17-B of the Executive Law, average amount of such contracts, the number of service-disabled veteran-owned businesses certified, the number of applications for certification, number of denials for certification, number of appeals of such denials, outcomes of such appeals and average time required for completion of the certification process.

(f) *State agencies' good faith efforts.* (1) State agencies shall make a good faith effort to meet the State agency's goals adopted pursuant to this Title.

(2) To determine whether the State agency has exercised good faith, the director must consider the following:

(i) whether there are certified service-disabled veteran-owned business enterprises that could participate in the type of procurement opportunities that the agency has to offer as prime contractors or subcontractors;

(ii) whether, where feasible, the State agency has attempted to unbundle State contracts and solicit bids from the certified service-disabled veteran-owned businesses;

(iii) whether there are certified service-disabled veteran-owned business enterprises, located outside of the regions in which State contracts are to be performed, that could participate in procurement opportunities;

(iv) whether the State agency has considered encouraging joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and certified service-disabled veteran-owned business enterprises to participate in the State agency's procurement opportunities;

(v) the number of opportunities that the State agency had to make discretionary purchases from certified service-disabled veteran-owned business enterprises versus the number of times the State agency actually made discretionary purchases from certified service-disabled veteran-owned business enterprises;

(vi) the amounts paid to certified service-disabled veteran-owned business enterprises as a result of State agency's discretionary purchasing;

(vii) whether the State agency utilized set asides for certain procurements from service-disabled veteran-owned business enterprises;

(viii) whether the State agency has processes and procedures in place to ensure that it has assessed each State contract for certified service-disabled veteran-owned business enterprise contract goals as required by this section;

(ix) whether the State agency's practices and procedures comport with article 17-B of the Executive Law and this Part with respect to utilization plans, utilization reports and waivers;

(x) whether the State agency has submitted compliance reports pursuant to section 252.2(e) of this Part; and

(xi) any other information submitted by the State agency or other criteria that the director deems relevant to determining whether the State agency exercised good faith, including but not limited to, the agency's compliance with the provisions of article 17-B of the Executive Law and these regulations.

(g) *State agency action plan.* A State agency that fails to meet its agency prescribed goals shall review its master goal plan to identify issues that resulted in its inability to meet its goals and identify steps to be taken and improvements to its processes and practices to advance such as establishing and meeting its goals in its next master goal plan cycle. Such State agency may confer with the director to discuss performance improvements in its procurements from service-disabled veteran-owned businesses so that the agency can overcome any ongoing difficulties and take positive actions to move forward with compliance with its master goal plan.

(h) *Establishing contract goals and identifying subcontract opportunities for certified businesses.* (1) Where practical, feasible and appropriate, State agencies shall seek to achieve a six percent goal on all State contracts for service-disabled veteran-owned business enterprises. Where achieving the goal is not practical, feasible or appropriate, State agencies shall seek a waiver as set forth in subdivision (m) of this section.

(2) State agencies shall notify contractors in bid documents, requests for proposals, contract announcements, advertisements or otherwise in writing and on the agency website of the goals established on State contracts.

(3) State agencies shall provide an electronic link to the current list of certified service-disabled veteran-owned business enterprises to each prospective contractor.

(4) In determining appropriate goals for a particular State contract, State agencies shall give consideration to the following factors:

(i) the contract and subcontract scope(s) of work;

(ii) the potential subcontract opportunities available in the prime contract;

(iii) other relevant availability data, if available to the scope of the contract and potential subcontracting opportunities;

(iv) the number and types of certified service-disabled veteran-owned business enterprises found in the directory of certified service-disabled veteran-owned businesses available to perform the State contract work;

(v) the geographic location of the contract performance;

(vi) the extent to which geography is material to the performance of the contract;

(vii) the ability of certified service-disabled veteran-owned enterprises located outside of the geographic location of contract performance, notwithstanding the regional location of the certified enterprise, to perform on the State contract;

(viii) the total dollar value of the work required by the State contract in relation to the dollar value of the subcontracting opportunities;

(ix) the relationship of the monetary size and term of the State contract to the monetary size and term of the project for which the State contract is awarded.

(i) *Utilization plans.* (1) State agencies shall require contractors to submit utilization plans for achieving contract goals established for the participation of certified service-disabled veteran-owned business enterprises performing commercially useful functions in relation to State contracts. A form for the utilization plan shall be provided by the State agency to the contractor for any request for bids, proposals or qualifications, or negotiated contracts, for which contract goals are established with:

(i) bid documents where a State contract is awarded pursuant to solicitation of bids;

(ii) requests for proposals or qualifications in the case of State contracts awarded pursuant to a request for proposals or qualifications; and

(iii) proposed contracts where a State contract will be awarded pursuant to negotiation without solicitation of bids or a request for proposals.

(2) Utilization plan forms submitted by contractors shall include, at a minimum, the following required information:

(i) the name, address and telephone number of the contractor;

(ii) the Federal identification number of the contractor;

(iii) the names, addresses, and Federal identification numbers of certified service-disabled veteran-owned business enterprises which the contractor intends to use to perform a commercially useful function on the State contract and a description of the contract scope of work which the contractor intends to structure to achieve participation pursuant to the prescribed State contract goals;

(iv) the estimated or, if known, actual dollar amounts to be paid to and performance dates of each component of a State contract which the contractor intends to be performed by a certified service-disabled veteran-owned business enterprise; and

(v) a statement that the utilization of certified service-disabled veteran-owned business enterprises for non-commercially useful functions may not be counted towards utilization of certified minority- and women-owned business enterprises in the utilization plan.

(3) In the event that a contractor responding to a State agency's solicitation is a joint venture, teaming agreement, or other similar arrangement that includes a certified service-

disabled veteran-owned business enterprise, such a contractor must submit the following to the State agency for its review and approval:

(i) the name, address, telephone number, and Federal identification of each partner or party to the agreement;

(ii) the Federal identification number of the joint venture or entity established to respond to the solicitation, if applicable;

(iii) a copy of the joint venture, teaming agreement, or other similar arrangement, which describes the percentage of interest owned by each party to the agreement and the value added by each party; and

(4) Certified service-disabled veteran-owned business enterprises may list themselves on utilization plans toward the achievement of prescribed contract goals.

(5) Proceeds from State contracts that are paid to certified service-disabled veteran-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

(j) *Set asides.* State agencies may reserve or set aside certain procurement opportunities for purposes of achieving the goals for participation of service-disabled veteran owned businesses to achieve the objectives of article 17-B of the Executive Law. The commissioner, in consultation with State agencies, shall develop and provide guidance for conducting procurements through the use of set asides with consideration given, but not limited to:

(1) ensuring that a competitive field of certified service-disabled veteran-owned business enterprises would be able to participate in such procurement opportunities;

(2) the processes to be used in the exercise of discretionary authority to make purchases from certified service-disabled veteran-owned business enterprises;

(3) contract consideration shall be reasonable and reflective of fair market value;

(4) developing and implementing pilot initiatives to initially test optimal use of set asides by State agencies;

(5) securing input from service-disabled veteran-owned businesses and other interested parties on use of set asides;

(6) the impact a set aside could have relative to the State agency achieving its goals for participation by minority and women-owned businesses in their procurements; and

(7) other factors as may be relevant to the exercise of set asides in procurement contracts.

The commissioner shall develop and provide written guidance to State agencies to assist in their use of set asides as directed by article 17-B of the Executive Law which may be revised from time to time based on experience with this procurement tool.

(k) *Posting of utilization plans.* (1) Upon execution of a State contract, State agencies shall post the utilization plan or waiver, if granted, and the following information on the State agency's website within 10 business days after approval by a State agency:

(i) the name and address of the contractor;

(ii) the contract number;

(iii) the project number, if applicable;

(iv) the contract award date;

(v) the estimated date of completion or end of contract term;

(vi) the amount obligated under the contract;

(vii) a description of work or deliverables required by the State contract;

(viii) the name and address of certified enterprises referenced in the utilization plan and contract work they shall perform; and

(ix) a description of any waivers granted.

(2) After commencement of contract, any waivers of compliance issued by the contracting agency or modifications to the utilization plan shall be posted on the State agency's website within 10 business days of the contracting agency making such a decision.

(l) *Submission and review of utilization plans.* (1) In the case of a request for proposals, request for qualifications, or negotiated State contracts, for which contract goals have been set, the time for submitting the utilization plan shall be upon submission of any proposal, qualifications, or negotiated contract. The State agency may waive or modify this requirement by sending a written notice to the director with an explanation 10 business days before solicitations are issued.

(2) In the case of any bid submission, utilization plans shall be submitted after the opening of bids, but in no case more than 10 business days after the contractor receives notice from a State agency that the contractor has submitted a low bid, provided the agency may adopt a longer time period for submission of utilization plans as to all or particular categories of its contracts upon filing of such period and any supporting justification with the director, and

subject to rejection or modification by the director. Any such modification or rejection shall apply to contract solicitations on or after the date of the rejection or modification.

(3) The State agency shall review a utilization plan submitted by a contractor and issue a written notice of acceptance or deficiency regarding the utilization plan no later than 20 business days after receipt of the utilization plan, and prior to the execution of the contract resulting from said procurement. A State agency may accept a utilization plan if:

(i) the contract goals, as determined by the State agency in the solicitation or bid, are to be provided by one or more certified service-disabled veteran-owned business enterprises;

(ii) the contractor submits a utilization plan which only partially satisfies the contract goals set forth in the solicitation, but is supported by the contractor's documented good faith efforts to submit a utilization plan as requested;

(iii) the contractor is a joint venture, teaming agreement, or other similar arrangement, with a certified service-disabled veteran-owned business enterprise whose value added or participation is equal to the percentage of the contract goals set forth in the solicitation.

(4) The notice of deficiency regarding the utilization plan shall include the following information:

(i) a statement that the contract shall not be awarded until a utilization plan has been approved or a waiver granted;

(ii) a specific request for the reasons why any certified service-disabled veteran-owned business enterprise was not selected to perform the scope of work which the State agency has determined can be reasonably structured by the contractor into subcontract(s) or other component(s) for purposes of complying with the State contract certified enterprise goal(s); and

(iii) any other facts relevant to the utilization plan.

(5) Unless otherwise specified in the information, instructions or requirements and any addenda provided to contractors for purposes of soliciting bids or proposals, a contractor must provide a State agency with a written remedy in response to a notice of deficiency within seven business days of its receipt.

(6) If the contractor's written remedy to a notice of deficiency is not timely provided or if the written notice is found by the State agency to be inadequate, such a failure to remedy the deficiency may be grounds for disqualification for non-responsiveness or the State agency may notify the contractor and request the contractor to submit a waiver form within five

business days. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid for non-responsiveness.

(7) Failure of the contractor to comply with the requirements of this subdivision may result in the disqualification of the contractor under this Part.

(8) The time requirements of this section shall apply unless otherwise agreed to in writing by the State agency and the contractor.

(9) If a contractor changes its utilization plan after submission, it shall be required to notify the State agency in writing of such change and obtain approval from the State agency in accordance with this section and this subdivision.

(m) *Waivers.* (1) A State agency shall not grant any automatic waivers of goal requirements on a State contract but may grant a partial or total waiver of goal requirements established on a State contract upon the submission of a waiver form by a contractor, documenting good faith efforts, as defined in this section, by the contractor to meet the goal requirements of the State contract, and in consideration of the following factors:

(i) the number and types of certified service-disabled veteran-owned business enterprises available to perform on any work under the contract;

(ii) the total dollar value of the State contract;

(iii) the contract scope of work to be performed;

(iv) the project size;

(v) the project term;

(vi) the availability of other business enterprises located in the region qualified to do the work to be performed;

(vii) the ability of certified service-disabled veteran-owned business enterprises located outside the region to perform the State contract; and

(viii) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge the contractor's duties pursuant to this Part or article 17-B of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals.

(2) Requests for a partial or total waiver of goal requirements established on a State contract made prior to the award of the contract may be made simultaneously with the submission of the utilization plan for that State contract. If a contractor is found non-

responsive or non-responsive by a State agency, the request for a waiver shall be deemed moot.

(3) Requests for a partial or total waiver made subsequent to award of a State contract may be made at any time during the term of the State contract but prior to the submission of a request for final payment on that contract.

(4) Forms for requests of a partial or total waiver of goal requirements established on a State contract, shall include a request for the following information, where applicable:

(i) a list of certified service-disabled veteran-owned business enterprises appearing in the directory which were solicited in writing to provide bids for purposes of complying with a State agency's goal requirements for certified service-disabled veteran-owned business enterprise participation;

(ii) proof of dates on which such solicitations were made in writing and copies of solicitations made, or a sample copy of the solicitation if an identical solicitation was made of all certified service-disabled veteran-owned business enterprises;

(iii) copies of responses made by certified service-disabled veteran-owned business enterprises to solicitations made by the contractor;

(iv) a description of any contract documents, plans or specifications made available to certified service-disabled veteran-owned business enterprises for purposes of soliciting their bids, and the dates and manner in which these documents were made available;

(v) documentation of any negotiations between the contractor and/or certified service-disabled veteran-owned business enterprises undertaken for purposes of complying with goal requirements established for certified service-disabled veteran-owned business enterprise participation;

(vi) any other information determined relevant by the State agency or the contractor; and

(vii) a statement setting forth the contractor's basis for requesting a partial or total waiver.

(n) *Contractor's efforts to utilize certified business enterprises.* (1) Contractors must document their good faith efforts toward utilizing certified service-disabled veteran-owned business enterprises, including but not limited to, those identified within a utilization plan. Such documented efforts, shall include, at a minimum:

(i) copies of its solicitations of certified service-disabled veteran-owned business enterprises and any responses thereto;

(ii) responses to the contractor's solicitations that were received, but a certified service-disabled veteran-owned business enterprise was not selected and the specific reasons that such enterprise was not selected;

(iii) the dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the State agency awarding the State contract, with certified service-disabled veteran-owned business enterprises which the State agency determined were capable of performing the State contract scope of work for the purpose of fulfilling the contract participation goals;

(iv) information describing the specific steps undertaken to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified service-disabled veteran-owned business enterprises.

(2) In addition to the information provided by the contractor in paragraph (1) of this subdivision, the State agency may also consider the following to determine whether the contractor has demonstrated good faith efforts:

(i) where applicable, whether the contractor submitted an amended utilization plan consistent with the subcontract or supplier opportunities in the contract;

(ii) the number of certified service-disabled veteran-owned business enterprises in the region listed in the directory of certified businesses that could, in the judgment of the State agency, perform work required by the State contract scope of work;

(iii) the actions taken by the contractor to contact and assess the ability of certified service-disabled veteran-owned business enterprises located outside of the region in which the State contract scope of work is to be performed to participate on the State contract;

(iv) whether the contractor provided relevant plans, specifications or terms and conditions to certified service-disabled veteran-owned business enterprises sufficiently in advance to enable them to prepare an informed response to a contractor request for participation as a subcontractor or supplier;

(v) the terms and conditions of any subcontract or provision of suppliers offered to certified service-disabled veteran-owned business enterprises and a comparison of such terms and conditions with those offered in the ordinary course of the contractor's business and to other subcontractors or suppliers of the contractor;

(vi) whether the contractor offered to make up any inability to comply with the certified service-disabled veteran-owned business enterprises goals in the subject State contract in other State contracts being performed or awarded to the contractor;

(vii) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge contractor's duties pursuant to this Part or article 17-B of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals;

(viii) whether the contractor knowingly utilized one or more certified service-disabled veteran-owned business enterprises, in the performance of the subject State contract, that contractor knew or reasonably should have known could not perform a commercially useful function;

(ix) whether the contractor submitted compliance reports pursuant to this section, which identified certified service-disabled veteran-owned business enterprises that contractor knew or reasonably should have known did not perform a commercially useful function on a State contract on which goals were assigned pursuant to this section;

(x) any other information that is relevant or appropriate to determining whether the contractor has demonstrated a good faith effort.

(o) *Contractor disqualification.* Where a State agency determines, after having given notice of deficiency, that a contractor has failed to submit an acceptable utilization plan or satisfactorily document its good faith efforts, the State agency may proceed with the next ranked bidder if the State agency has not received a request for a review of such finding from the contractor. The State agency, shall conduct such review providing the contractor with an opportunity to be heard and make a determination that confirms the contractor is disqualified or reaffirms that the contractor is qualified. Such determination shall constitute a final agency determination.

(p) *Contractor compliance reporting.* (1) State agencies are responsible for determining compliance by contractors with goals established in State contracts.

(2) A State agency may determine that a contractor is complying with contract goals set forth in the utilization plan if:

(i) the contractor is a certified service-disabled veteran-owned business enterprise and is responsible for 100 percent of the contract performance;

(ii) the State agency has verified that the contract goals are being achieved with certified, value added enterprises; or

(iii) a review of contractor compliance reports and the determination of compliance is consistent with procedures or actions described in the State agency's master goal plan.

(q) *Contractor compliance reports.* (1) Contractor compliance reports shall be submitted by contractors with respect to State contracts for which a utilization plan was required and approved by a State agency.

(2) Contractor compliance reports shall be filed at intervals required by information, instructions or requirements pursuant to which bids and proposals have been solicited, or the terms and conditions of a State contract awarded pursuant to negotiation.

(3) A contractor compliance report shall include, but not be limited to the following information:

(i) the name, address and telephone number of each certified service-disabled veteran-owned business enterprise the contractor is using or intends to use to comply with the utilization plan;

(ii) a brief description of the contract scope of work to be performed for the contractor by each certified service-disabled veteran-owned business enterprise and the scheduled dates for performance;

(iii) a statement of whether the contractor has a written agreement with each certified service-disabled veteran-owned business enterprise, and if requested, copies of such agreements, the contractor is using or intends to use;

(iv) the actual total cost of the contract scope of work to be performed by each certified service-disabled veteran-owned business enterprise for the contract; and

(v) the actual amounts of any payments made by the contractor to each certified service-disabled veteran-owned business enterprise as of the date the compliance report was submitted.

(4) Proceeds from State contracts that are paid to certified service-disabled veteran-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

(r) *Contractor and State agency complaints.* (1) Subsequent to the award of a State contract to a contractor that becomes deficient with regard to its utilization plan, the contractor may file a complaint with the State agency. The complaint should state the reasons for the complaint, together with a demand for relief and include the following information:

(i) the contractor's receipt of a written determination by a State agency that the contractor is not entitled to a partial or full waiver of the goals established in a State contract for participation by certified service-disabled veteran-owned business enterprises; or

(ii) the contractor's receipt of a written determination by a State agency that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals; or

(iii) the State agency shall provide the contractor with an opportunity to be heard and the State agency shall conduct a review and shall render a determination regarding the merits of the complaint.

(2) Within 20 days of the State agency determination that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals for participation by the certified service-disabled veteran-owned business established in the State contract, a State agency may after giving contractor an opportunity to be heard, make a determination that contractor has failed to meet the contract goals and assess such other damages as were identified in the contract.

(s) *Provisions in contracts; violations.* Every contracting agency shall include a provision in its State contracts expressly providing that any contractor who willfully and intentionally fails to comply with the service-disabled veteran owned business participation requirements of these regulations as set forth in such State contract shall be liable to the contracting agency for damages as otherwise specified in the contract, and shall provide for other appropriate remedies on account of such breach. Damages shall be calculated based on the actual cost incurred by the State agency related to the State agency's expenses for personnel, supplies and overhead related to establishing, monitoring, and reviewing certified service-disabled veteran-owned business enterprise programmatic goals.

§ 252.3 Statewide Certification Program - Purpose, scope and applicability.

The purpose of this section is to provide criteria and procedures by which the director makes determinations to approve, deny or revoke the service-disabled veteran-owned business enterprise status of applicants and certified business enterprises. This section is applicable to the certification of businesses as service-disabled veteran-owned businesses under article 17-B of the Executive Law.

(a) *Eligibility criteria.* The following standards shall be used to determine whether a business enterprise is eligible to be certified as a service-disabled veteran-owned business enterprise.

(1) *Ownership.* For the purposes of determining whether an applicant should be granted or denied service-disabled veteran-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

(i) the contribution of the service-disabled veteran-owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;

(ii) the business enterprise must demonstrate that it is an independent, real, substantial and continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities;

(iii) a sole proprietorship must be owned by a service-disabled veteran member;

(iv) a partnership or a limited liability company must demonstrate that service-disabled veteran member(s) have a 51 percent or greater share of the partnership or limited liability company; and

(v) a corporation must have issued at least 51 percent of its authorized voting and all other stock to service-disabled veteran members or shareholders.

(2) Control. Determinations as to whether service-disabled veteran owners or members control the business enterprise will be made according to the following criteria:

(i) Decisions pertaining to the operations of the business enterprise must be made by service-disabled veteran owners or members claiming ownership of that business enterprise. The following will be considered in this regard:

(a) Service-disabled veteran owners or members must have adequate managerial experience or technical competence in the business enterprise seeking certification.

(b) Service-disabled veteran owners or members must demonstrate the working knowledge and ability needed to operate the business enterprise.

(c) Service-disabled veteran owners or members must show that they devote time on an ongoing basis to the daily operation of the business enterprise.

(ii) Articles of incorporation, corporate bylaws, partnership agreements, limited liability company agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit service-disabled veteran owners or members who claim ownership of the business enterprise to make those decisions without restrictions.

(iii) Service-disabled veteran owners or members must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.

(3) Additional requirements. The following requirements apply to all applicants seeking service-disabled veteran-owned business enterprise status and inclusion in the directory of certified businesses:

(i) documentation may be required to substantiate the claim of service-disabled veteran owner status;

(ii) an eligible service-disabled veteran owner applicant must be an independent business enterprise. The ownership and control by the service-disabled veteran-owner must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. The service-disabled veteran owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise;

(iii) where the actual management of the business enterprise is contracted out to individuals other than service-disabled veteran-owner, the owner must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise;

(iv) applicants are required to conduct business activities for, generally, at least one year prior to the application date. Applicants who have been conducting business activities for less than one year, may not be able to provide sufficient information upon which a certification decision can reasonably be made, and therefore their application may be rejected; and

(v) the division may require additional documentation in order to ascertain and/or identify an applicant's ability and/or capacity to perform a commercially useful function on certain State contracts.

(b) *Application intake and verification.* (1) Applications for certification may be obtained from and returned to DSDVBD.

(2) DSDVBD shall date stamp an application upon receiving it. If an application is received by the division and required documents are missing, questions are unanswered or the application is not properly notarized, the division will notify the applicant within 30 days of the initial date stamped on the application of the status of its application and any deficiency arising from missing documents, unfinished questions or deficiencies in notarization. An applicant may cure the notice deficiency by providing the division with documents or information requested in the notice of status and deficiency, within 20 days of the date of receipt of the notice of status and deficiency.

(3) When the applicant cures a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section, the division shall have an additional 30 days to advise the applicant of any further deficiency, which deficiency may be cured in accordance with paragraph (2) of this subdivision.

(4) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section and the application remains incomplete, for at least 20 days of the date of the notice of deficiency, the applicant shall be notified, in writing, that its application has been rejected and will not be processed.

(5) An applicant may not reapply for certification for at least 90 days from the date of the notice of rejection of its application.

(6) Applicants for certification may be required to submit additional information including, but not limited to, tax and financial information, leases and business agreements and consent to inquiries of bonding companies, banking institutions, credit agencies, contractors, affiliates and clients to ascertain the applicant's eligibility for certification. Refusal to permit such inquiries shall be grounds for rejection of a certification application.

(7) An application shall be deemed complete when written notice has been sent to the applicant by the division stating that its application is complete.

(8) An applicant's refusal to permit an inspection of its place of business may be grounds for rejection of the application.

(9) An application may be withdrawn by an applicant without prejudice at any time before the division has sent a notice that an application has been completed. Following the withdrawal of an application, the applicant may not reapply for certification for a period of at least 90 days.

(10) Vendor responsibility is not a certification issue. Each State agency independently verifies vendor responsibility per each solicitation.

(c) *Notice of determination, right to appeal and requests for hearing.* (1) Within 60 days of the mailing of a notice by the division that the application has been completed, the director shall provide the applicant with written notice of a determination approving or denying certification status.

(2) In the event a determination is made to approve certification by the director, the applicant will be provided with written notice of such determination and will hold service-disabled veteran-owned business enterprise status for five years or until notified of the need to reapply at the director's request.

(3) In the event a determination is made to deny certification, a written notice of such determination shall be provided to the applicant stating the reason(s) for denial. Such notice shall also state the procedures for filing an appeal before a hearing officer.

(d) *Revocation of service-disabled veteran-owned business enterprise status.* (1) The director shall revoke the service-disabled veteran owned business enterprise status of a certified business for a period of two years, if it is demonstrated that the service-disabled veteran owner members no longer own and control the business enterprise in accordance with rules set forth in this Part.

(i) A certified business enterprise must notify the division within 30 days of any material change in the information contained in the original application. A material change may include, but is not limited to, any of the following developments: percentage of ownership in the business enterprise, address, officers or services provided by the certified business. If a material change is indicated, a review may be conducted by the division.

(2) The division, only upon receiving specific allegations based in facts which indicate that a certified business enterprise is no longer entitled to service-disabled veteran-owned business enterprise status, may take the following actions:

(i) determine whether the allegation can be substantiated;

(ii) obtain in writing, if possible, the basis of any allegation from the person or persons making the allegation;

(iii) notify a certified business in writing upon a determination that its service-disabled veteran-owned business enterprise status is under review by the director and may be revoked. This notice shall specify the basis for such review and any facts specifically at issue;

(iv) provide the certified business whose status is under review, with an opportunity to respond in writing to any allegations set forth in notices of certification status review within 20 days of the date of such notice, by personal service or certified mail, return receipt requested; and

(v) meet or conduct site visits, if deemed necessary, with service-disabled veteran owners or members claiming ownership and control of the certified business enterprise.

(3) If the service-disabled veteran owners or members of a certified business fail to timely respond in writing to the notice of certification status review, or fail to meet or agree to a site visit, the service-disabled veteran owned business status of the certified business enterprise shall be revoked by the director.

(4) The director shall notify, in writing, a business of the revocation of its service-disabled veteran-owned business enterprise status within 10 days of revoking such status. The service-disabled veteran owners or members claiming ownership and control of a business which has had its service-disabled veteran-owned business enterprise status revoked, may request a hearing before a hearing officer within 30 days of the date of the notice of revocation. Such hearing shall be conducted in accordance with procedures set forth in this section. If a request for a hearing is not made within the 30 day period, the director's determination shall be final and the business enterprise may not reapply for certification for two years from the date of the notice of revocation provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(5) The service-disabled veteran owners or members shall be provided with notice of the date, time and place of their hearing before the hearing officer, at least 10 days prior to the date of the hearing.

(6) The hearing officer shall conduct a hearing and render a decision whether the certified business should retain its service-disabled veteran-owned business enterprise status, or whether such status should be revoked in accordance with paragraph (1) of this subdivision. The hearing officer may request additional information of the service-disabled veteran owners and members who requested the hearing, or the division.

(7) The hearing officer shall issue a decision to the director to affirm, reverse or modify the original determination. Within 30 days of the decision, the director shall accept, reject or modify the hearing officer's decision and set forth in writing the reasons for doing so. The director shall forward a copy of the decision to the business enterprise by personal service or certified mail, return receipt requested. In the event of a decision to revoke the service-disabled veteran-owned business enterprise status of a business enterprise, the business enterprise may not reapply for certification for two years from the date of the original notice of revocation, provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(8) The final decision of the director shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.

(e) Criteria for acceptance of Federal certification in lieu of completing and submitting the New York State service-disabled veteran-owned business enterprise certification application.

(1) The DSDVBD shall approve an applicant as a certified business without requiring that applicant to complete the New York State service-disabled veteran-owned business enterprise certification application provided:

(i) the applicant demonstrates that it holds a current federal certification by submitting a true copy of the certification to the DSDVBD;

(ii) the applicant completes the supplemental application;

(iii) the applicant provides a signed authorization for the exchange of information between the division and the certifying entity for the purpose of determining the applicant's eligibility for certification;

(iv) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the Federal certification is accurate to the best of that person's knowledge; and

(v) the applicant provides proof satisfactory to the DSDVBD that the applicant is owned, operated and controlled by service-disabled veteran owners or members and that the individual or individuals whose ownership, control and operation are relied upon for certification, meet the requirements of and the definition of small business set forth in these regulations.

(2) Notwithstanding anything to the contrary in paragraph (1) of this subdivision, the DSDVBD reserves the right to:

(i) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in article 17-B of the Executive Law;

(ii) reject or deny certification if the DSDVBD is not satisfied that the applicant meets all of the eligibility criteria set forth in article 17-B of the Executive Law.

(3) After verification by the DSDVBD that an applicant has satisfied all such criteria as applicable, such applicant shall become certified as a service-disabled veteran-owned business enterprise without completing the New York State service-disabled veteran-owned business enterprise certification application.

(4) The process described in this section of this Part will apply to the supplemental applications.