

ACEC Workforce Participation Goals Issues, July 29, 2021

- Many of our firms are reporting out on EEO numbers. Is this the information this law is looking for or is it different?

This law requires the tracking of the actual hours worked by the targeted employees. It is different from the EEO reporting.

- We would want to make sure that the creation of model language for inclusion in new contracts that takes into account, among other things, firm size. Would this be possible?

There is no provision in the law that allows consideration of the size of the firm. However, since the designer has to make “good faith efforts” to meet the goals, I expect that the size of the firm would be taken into consideration.

- How is this data that will be reported to the public owners going to be used? Does municipality/contracting entity report it to the state? If yes, where?

As I understand it, it becomes part of the awarding authority’s records. State agencies are supposed to report this to A & F. “The secretary of administration and finance must file an annual report with the house and senate clerks, who shall forward the report to the joint committee on state administration and regulatory oversight and the house and senate committees on ways and means.” I have not come across anything that requires municipalities to provide their data to any state agency.

- How do forms comply with this reporting requirements since some employees may not provide the info voluntarily?

You cannot force an employee to disclose his/her race or gender. Once again, I would consider this a mitigating factor in determining whether there has been a good faith effort by the design company.

- As prime contract holders typically assign/bind the duties/responsibilities of the prime contract to their sub-consultants, are there any legal issues with assigning/binding sub-consultants to the workforce participation reporting requirements of the prime?

See A & F Bulletin 14: Subcontractor Requirements

Prior to the award of any subcontract for a state construction contract or a state assisted construction contract, regardless of tier, the Prime or General Contractor shall provide all prospective subcontractors with a complete copy of this Section entitled “Supplemental Equal Employment Opportunity, Non-Discrimination and Affirmative Action Program”

and will incorporate the provisions of this Section by reference into any and all contracts or work orders for all subcontractors providing work on the Project. In order to ensure that the said subcontractor's certification becomes a part of all subcontracts under the prime contract, the Prime or General Contractor shall certify in writing to the administering agency that it has complied with the requirements as set forth in the proceeding [sic] paragraph.

- What is the definition of minority that should guide these submissions?

See A & F Bulletin 14 here: <https://www.mass.gov/doc/commonwealths-supplemental-equal-opportunity-non-discrimination-and-affirmative-action-program/download>

“Minority” means a person who meets one or more of the following definitions:

- (a) American Indian or Native American means: all persons having origins in any of the original peoples of North America and who are recognized as an Indian by a tribe or tribal organization.
 - (b) Asian means: All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian sub-continent, or the Pacific Islands, including, but not limited to China, Japan, Korea, Samoa, India, and the Philippine Islands.
 - (c) Black means: All persons having origins in any of the Black racial groups of Africa, including, but not limited to, African-Americans, and all persons having origins in any of the original peoples of the Cape Verdean Islands.
 - (d) Eskimo or Aleut means: All persons having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia.
 - (e) Hispanic means: All persons having their origins in any of the Spanish-speaking peoples of Mexico, Puerto Rico, Cuba, Central or South America, or the Caribbean Islands.
- What can be done to help prevent/defend a legal challenge to the numbers being reported? Is this even an issue if these are goals vs requirements?

Document your good faith efforts to reach the goals.

- What are the ramifications of not meeting the goals?

That will depend on what each awarding authority decides to set as the enforcement mechanism. A & F Bulletin 14 says:

The secretaries or their designees, shall have the power by means of contract provisions, consistent with due process requirements to the extent applicable, to impose sanctions

upon contractors and subcontractors found to be in non-compliance with this section as follows:

- (1) suspension of payments;
- (2) termination of contract;
- (3) recovery by the commonwealth of the contract award price as liquidated damages; or
- (4) denial of the right to participate in future projects for a maximum of three years.

- When the language is not currently in the designer's contract, are there still reporting requirements or is this only for new contracts which have the contract language?

My opinion is that you cannot be held responsible if the contract does not mention this statute.

- Some firms are expressing concern that to meet the goals, they would have to make sure that they assign women and minorities to mostly public sector design jobs, rather than private sector design jobs, which could inadvertently limited work experience and career development for those staffers.

Are you saying that the designers assigned to public sector jobs would result in those designers not having experience in private sector jobs?

- And just to clarify – this is only for Chapter 149 projects, correct? (not Chapter 149A not Chapter 30)

It is my opinion that this law applies to all construction contracts, including 149A and 30, 39M as well as design contracts.