STATE ADMINISTRATIVE MANUAL

MANAGEMENT MEMO

NUMBER: 98-04	
SUBJECT: MINORITY AND WOMEN BUSINESS ENTERPRISE PARTICIPATION REQUIREMENTS FOR STATE CONTRACTING	DATE ISSUED: MARCH 10, 1998
	EXPIRES: UNTIL RESCINDED
REFERENCES: Executive Order W-172-98, and State Contracting Manual	ISSUING AGENCY: Department of General Services

This Management Memo is intended to assist state agencies, departments, boards, and commissions, in complying with the requirements of Executive Order W-172-98.

The Executive Order applies to specified contracting activities occurring on or after March 10, 1998, and affects **all** state contracts, including any agreement or joint development agreement to provide labor, services, materials, supplies, or equipment in the performance of a contract, franchise, concessions, or lease granted, let, or awarded for and on behalf of the State of California. It does not apply to federally-funded contracts or current statutory requirements for disabled veteran business enterprise (DVBE) goals and the good faith efforts to meet DVBE goals.

Table A attached to this memorandum relates to Contracts, and lists appropriate actions agencies should take depending on the status of their contracts.

Table B attached to this memorandum relates to Solicitations, and lists appropriate actions agencies should take depending on the status of their solicitation effort.

Table C attached to this memorandum contains some suggested language that agencies may utilize in specified situations relating to Contracts or Solicitations .

The Department of General Services (DGS) will be amending and/or repealing its regulations relating to MBE and WBE programs (CCR Title 2, section 1896.60, et seq.). Departments which have adopted the Department of General Services' regulations may be affected by these changes.

Should you have additional contracting questions, please call the Office of Legal Services at DGS at (916) 445-4084.

Peter G. Stamison

PETER G. STAMISON, Director
Department of General Services

TABLE A [1] [2]
(Contracts)

Status of Contracts	Appropriate Action
Contract does not contain MBE/WBE requirements.	No action is necessary
Contract awarded prior to 3/10/98, with MBE/WBE requirements.	Requirements for MBE/WBE remain as stated in the contract.
Contract with MBE/WBE requirements awarded on or after 3/10/98.	Contracts awarded on or after 3/10/98 must not be approved if they are the result of solicitations containing any MBE or WBE requirements. Agencies should notify the contractor that the contract will not be executed as it exists, and a new solicitation will be conducted.[3]
Existing contract is in place and being performed by the contractor who now wants to eliminate the MBE and/or WBE subcontractors.	Agencies should inform the contractor they have a contractual obligation to comply with existing contract provisions, including the subcontracting provisions.
Existing contract is in place and being performed by the contractor, who has lost an MBE or WBE subcontractor, through no fault of their own.	Contractors must comply with any subcontractor substitution provisions contained in the contract, solicitation document, or in regulations.
Existing contract is amended on or after 3/10/98.	MBE/WBE participation, pursuant to PCC Section 10115, cannot be required in amendment. Agencies must be careful not to interfere with current contractual arrangements between contractor and sub-contractor.

[1] Note: The actions listed here are appropriate regardless of whether DGS or the awarding department has approval authority for the contract. For contracts submitted to DGS for approval, agencies must indicate the date of the contract award on the Std. 15 Contract Transmittal Form, or other transmittal document.

[2] Note: For purposes of Tables A – Tables C, the following definitions apply: 1) the term "award" means the date the agency communicates to the bidder that they are being awarded the contract (this does not include any preliminary notification or an "intent to award"); and 2) the term "contract" means all state contracts, including but not limited to those defined in PCC Section 10115, including EDP and telecommunications contracts, and purchase orders.

[3] See Suggested Language in Table C.

TABLE B
(Solicitations)

Status of Solicitation Effort	Appropriate Action
Solicitation is still under development as of 3/10/98. *(MBE/WBE subcontracting requirements are included)*	Do not include MBE/WBE requirements in the bid package. Include DVBE requirements.[4] Modify the final response due date if necessary. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for revised solicitation.
Solicitation is under development as of 3/10/98. *(If MBE/WBE subcontracting requirements are not included)*	Proceed without change.
Solicitation has been sent to bidders but final response due date has not yet occurred as of 3/10/98. *(MBE/WBE requirements are included)*	Send addendum[5] to all known bidders who received the original solicitation informing them that the MBE/WBE requirements are being deleted, but that the DVBE requirements remain. Re-advertise with a notation that MBE and WBE requirements have been deleted. Extend the final response due date to allow time for revised responses. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for revised solicitation.
Responses have been received in response to the solicitation, but award has not yet been made as of 3/10/98. *(MBE/WBE requirements are included)*	Notify all bidders who received the original solicitation that all bids have been rejected, that the solicitation has been canceled; and that a new solicitation will be forwarded to them without the MBE/WBE requirements. The new solicitation should be re-advertised with a final response date modified as necessary to accommodate the changes. Bidders who participated in the original solicitation should be advised that their DVBE efforts (i.e. advertisement, etc.) may be used for the new solicitation. If this is a rebid of an existing contract, a contract extension may be necessary to provide additional time for the new solicitation. If a letter of intent to award has been issued, agencies should send a letter to the intended awardee, retracting the previous letter of intent to award.

[4] The Office of Small and Minority Businesses (OSMB) is currently preparing DVBE forms for use in state agency solicitations.

[5] See Suggested Language in Table C.

Table C
(Suggested Language)

Situation (Based on Table A or B)	Suggested Language
Agency must notify contractor that the contract containing MBE/WBE requirements cannot be executed.	*Contract XX-XXX cannot be executed. A recent decision by the U.S. Ninth Circuit Court of Appeals (Monterey Mechanical), which became final on March 9, 1998, has held that the statutory requirements for MBE and WBE goals and good faith efforts are unconstitutional. As a result, this contract will be rebid without these MBE and WBE requirements. (DVBE requirements remain unchanged. The efforts you made toward meeting the DVBE requirement may be submitted with your response to the new solicitation.)*
Agency must send out an addendum to all holders of the current bid/solicitation package informing them the MBE and WBE requirements are being deleted.	*A recent decision by the US Ninth Circuit Court of Appeals (Monterey Mechanical), which became final on March 9, 1998, has held that the statutory requirements for MBE and WBE goals and good faith efforts are unconstitutional. This addendum deletes all MBE and WBE requirements. (DVBE requirements remain unchanged, and the efforts you made toward meeting the DVBE requirement may be submitted with your new response.) The final response due date is/is not [agencies must choose one] being extended.*