

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

COMMISSION FOR STATEWIDE CONTRACTS TO SUPPORT EMPLOYMENT FOR INDIVIDUALS WITH DISABILITIES

Statutory Authority: 16 Delaware Code, Section 9604(a)(2)b and (e) (16 Del.C. §9604(a)(2)(b) and (e))

FINAL

ORDER

9102 Regulations for Set Aside Contracts

BEFORE THE STATE USE LAW COMMISSION OF THE STATE OF DELAWARE

AND NOW, this 17th day of October, 2017, the Commission for Statewide Contracts to Support Employment for Individuals with Disabilities (the "Commission") determines and orders the following:

WHEREAS, pursuant to 16 Del.C. §9604(e) and 29 Del.C. §10111, the Commission has the statutory power and authority to promulgate regulations which, inter alia, will govern its operations; and

WHEREAS, pursuant to 29 Del.C. §§10113(b)(1) and (2), the Commission wishes to adopt and promulgate such regulations and to publish them in the Registrar of Regulations as required by 29 Del.C. §10113; and

WHEREAS, these regulations describe and govern the Commission's operations, including the process by which central nonprofit agencies are selected; contracts, or portions of contracts, are set aside and awarded to central nonprofits or community rehabilitation programs; and prices are set. Hence, these regulations are exempt from formal notice requirements pursuant to 29 Del.C. §10113(b)(2) and 16 Del.C. §9604(e), and no formal notice period or public comment period is required pursuant to 29 Del.C. §§10115 to 10118;

NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN FOUR COMMISSIONERS:

1. Pursuant to 16 Del.C. §9604(e) and 29 Del.C. §10113(b)(2), the Commission hereby adopts the Regulations for Set Aside Contracts (the "Rules") as its official regulations as defined by 29 Del.C. §1132(3). A true and correct copy of the Rules is attached as **Exhibit "A"**.

2. The Director of the Division for the Visually Impaired shall transmit a copy of this order (with the attached Rules) to the Registrar of Regulations for publication in the Delaware *Register*. An exact copy of the Rules shall be published as the current official regulations in the Delaware *Register*.

3. The Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper, including promulgating any amendments to the Rules and promulgating any additional regulations in the future.

BY ORDER OF THE COMMISSION:

Doyle Dobbins, Vice-Chair - member of public

Deloris Hayes-Arrington (Finance) - Finance member

Dean Stotler, GSS - GSS Director

Carvella Jackson - member of public

Cynthia Fairwell (DOL) - DVR Director

[NOTE: Two voting members from the public have not been appointed as of this date.]

9102 Regulations for Set Aside Contracts

1.0 General Provisions

The Commission for Statewide Contracts to Support Employment for Individuals with Disabilities (the "Commission") is established by Chapter 96 of Title 16 of the Delaware Code. The purpose of these regulations is to guide the Commission in its work of enabling, through set aside contracts, the employment of Delaware citizens who are visually impaired or who have other disabilities.

2.0 Definitions

The following words and terms, when used in these regulations, have the following meaning unless such terms are otherwise defined in the Delaware Code or unless the context clearly indicates otherwise. Words used in the singular number include the plural, and the plural includes the singular. Words importing the masculine gender include the feminine as well and all singular terms will include the plural, except as otherwise clearly indicated by the context.

"Central nonprofit agency" or "CNA" means any nonprofit entity under 26 U.S.C. §501 that is organized under the laws of the State of Delaware and that the Commission selects to do at least one of the tasks set forth in either 16 **Del.C. §9602(3)a** or **§9602(3)b**.

"Community rehabilitation program" or "CRP" means any entity that provides or coordinates rehabilitation services for individuals with visual impairments and other disabilities, including assessment, customized employment, medical, personal assistance, psychiatric, psychological, rehabilitation technology, supported employment, or vocational services. A CRP typically will contract with a state agency, such as the Division of Vocational Rehabilitation, the Division for the Visually Impaired, the Division of Substance Abuse and Mental Health, the Division of Developmental Disabilities Services, or the Division of Services for Aging and Adults with Physical Disabilities, to provide assistance to eligible individuals according to their needs in all areas of community participation, including the assistance individuals may need to obtain and keep employment.

"Fair market value" means the price, service level, quality, and life cycle costing for a product or service that is commercially reasonable when compared to the open market.

"Government Support Services" or "GSS" means the section of the Office of Management and Budget that is established by and has all of the powers, duties, and functions set forth in 29 **Del.C. §6308A**.

"Procurement list" means the list of formally negotiated contacts by Government Support Services for the purchase of products or services as reference in 16 **Del.C. §9604(d)**.

"Set-aside contract" means a formal, negotiated agreement between one or more CNAs or CRPs and Government Support Services for a service or product that has been exempted from the procurement process under Chapter 69 of Title 29 of the Delaware Code and awarded by the Commission for a price that the Commission has approved.

3.0 Selection, Accountability, and Funding of CNAs

3.1 CNA Selection. The Commission shall designate one or more CNAs for a three-year period, after which each designated CNA may apply to renew its designation for another three years. Applications for CNA status may be made to the Commission between March 1st and April 30th and between September 1st and October 31st of each calendar year. The CNA selection criteria shall be reviewed and revised periodically by the Commission. Nevertheless, an applicant must demonstrate the following minimum criteria:

- 3.1.1 Its tax-exempt non-profit entity status under 26 U.S.C. §501 and under similar state income tax codes. Such status must be verified by providing proper documentation;**
- 3.1.2 Its ability to manage contracts within the State of Delaware;**
- 3.1.3 Its expertise in the employment of persons with visual impairments or other disabilities, which may include evidence of its history of providing job opportunities to such persons;**
- 3.1.4 Its capacity to fulfill the duties of a CNA, as described in subsection 3.2 of these regulations; and**
- 3.1.5 Its ability to fulfill the duties of a CNA as shown by letters of reference from CRPs with which it intends to subcontract.**

3.2 Duties of the CNAs. The responsibilities of the CNAs shall include, but not be limited to, the following:

- 3.2.1 Recruiting and assisting CRPs in developing and submitting proposals for set aside contracts for suitable products and services;**
- 3.2.2 Facilitating the distribution of subcontracts among CRPs;**
- 3.2.3 Managing and coordinating the deliverables of service under set aside contracts, including quality assurance and general administration of subcontracts with CRPs;**
- 3.2.4 Handling complaints and ongoing customer relations with agencies of this State;**
- 3.2.5 Educating and training CRPs to improve the quality and cost-effectiveness of services described in set aside contracts;**
- 3.2.6 Promoting the increase in supported employment opportunities for persons who are visually impaired or who have other disabilities;**
- 3.2.7 Marketing products and services to potential consumers;**
- 3.2.8 Researching and developing products and services;**
- 3.2.9 Producing content that the Commission may consider for inclusion in its annual report and in other public relations materials or submitting information to the Commission that may be included in the Commission's annual report;**
- 3.2.10 Preparing accurate purchase orders and invoices for those set aside contracts mentioned by the CNA;**
- 3.2.11 Making payments to CRPs in a timely manner; and**
- 3.2.12 Other duties as designated by the Commission.**

- 3.3 Semi-annual Reviews. The Commission or its designee shall conduct semi-annual reviews of the services provided by CNAs to determine whether the CNAs have fulfilled the duties listed in subsection 3.2 of these regulations. The Commission shall use as the basis for its reviews the work and performance of the CNAs as documented in its meeting minutes from regularly-scheduled meetings or as documented in other materials that have been provided upon the Commission's request. The reviews must be completed between March 1st and April 30th and between September 1st and October 31st of each calendar year. If the Commission notes any deficiencies in the performance of a CNA, the Commission will negotiate with the CNA a mutually-agreeable corrective action plan.
- 3.4 CNA Management Fees. CNA management fees must be included as part of any approved set aside contract price for products or services. Invoices will be paid according to the contract price. Agreements between CNAs and CRPs regarding management fees charged by the CNAs may be reviewed annually by the Commission. Subsection 5.7 of these regulations provides guideline for CNAs and CRPs with regard to fair market value.
- 3.5 CRP Affiliation Prohibited. CNAs shall not require CRPs to pay membership dues in order for CRPs to be assigned a subcontract under set aside contracts held by the CNAs.
- 3.6 Direct Contracting by CRPs. CRPs may receive set aside contracts directly from the Commission or from the State if the CRPs' personnel can fulfill the duties normally expected of a CNA as described in subsection 3.2 of these regulations.
- 3.7 State Agency CNAs. The Division for the Visually Impaired will fulfill the duties of a CNA for the Delaware Industries for the Blind. Other state agencies may apply to be considered as CNAs by the Commission if the agencies can fulfill the duties of CNAs as described in subsection 3.2 of these regulations.

4.0 Duties of the CRPs

- 4.1 The responsibilities of the CRPs shall include, but not be limited to, the following:
- 4.1.1 Recruiting and assisting individuals with disabilities for opportunities and job placement in set aside contracts for suitable products and services;
- 4.1.2 Facilitating the distribution of opportunities for individuals with disabilities among established set aside contracts;
- 4.1.3 Managing and coordinating the deliverables of service under set aside contracts, including quality assurance and general administration of set aside contracts they hold or through the CNA on whose behalf they are performing services;
- 4.1.4 Handling complaints and ongoing customer relations with agencies of this State when directly contracted and through their CNAs when subcontracted;
- 4.1.5 Educating and training individuals with disabilities to improve the quality and cost-effectiveness of services described in set aside contracts;
- 4.1.6 Promoting the increase in supported employment opportunities for persons who are visually impaired or who have other disabilities;
- 4.1.7 Marketing products and services to potential consumers;
- 4.1.8 Researching and developing products and services;
- 4.1.9 Producing content that the Commission may consider for inclusion in its annual report and in other public relations materials or submitting information to the Commission that may be included in the Commission's annual report;
- 4.1.10 Preparing accurate purchase orders and invoices for those set aside contracts under which they are operating; and
- 4.1.11 Other duties as designated by the Commission.

5.0 Set Aside Contract Requests

- 5.1 All set aside contract requests submitted by a CRP, its designed CNA, or both, if applicable, must provide all relevant information required by the Commission.
- 5.2 Agencies and community service providers who desire to participate in set aside contract requests need to provide verification that they are a CRP as defined by Delaware law. A CNA is responsible for ensuring that CRPs with which it subcontracts meet the requirements for participation.
- 5.3 When a CNA or a CRP wants to develop and research a new product or service for a set aside contract, the CNA or CRP may submit to the Commission a "Request for Assignment." The form set forth in Section 9.0 must be used when requesting an assignment.
- 5.4 The period allowed for developing the new product or service should not exceed twelve (12) months.

- 5.5 At the end of a development period, the CNA or CRP must present the assigned product or service to the Commission for its consideration as a set aside contract. If the CNA or CRP does not request a set aside contract at that time, then the CNA or the CRP may request a time extension. If a CNA or a CRP requests a time extension, the Commission may approve a six-month extension by a majority vote at a regularly-scheduled and convened meeting and shall document such granted time extension.
- 5.6 In keeping with the scope and purpose of 16 Del.C. Ch. 96, the Commission, designated CNAs, and any CRPs assigned to a set aside contract must assure that persons who are visually impaired or who have other disabilities as defined by the Americans with Disabilities Act of 1990 (ADA) will perform 75% of all direct labor for service-based contracts and 50% of all direct labor for product-based contracts. A phase-in plan may be requested by the CNA or the CRP, and any such approved phase-in plan will start at 25% less than the direct labor requirements, with that percentage increased to the required minimum standards as soon as possible, but no less than eighteen (18) months into the term of the set aside contract.
- 5.7 The Commission will typically consider products or services proposed to it if the price of the product or service is within 10% or less of the amount the State is currently paying, or if the price is 10% or less than or within the fair market value.
- 5.8 If two CRPs or CNAs request a set aside contract for the same service or product at the same time, the Commission will determine which agency is best prepared to provide the service or product by evaluating each CNA based on criteria delineated in subsections 3.1 and 3.2 and by evaluating each CRP based on the criteria delineated in subsection 4.1.

6.0 Information for a Set Aside Contract

- 6.1 The designated CNA and CRP must provide the following information when requesting a set aside contract for a particular product or service:
- 6.1.1 A copy of a specification or a clear description of the product or service, including samples of products, when appropriate.
- 6.1.2 A verification of the fair market value and employment impact, which may include:
- 6.1.2.1 Obtaining the most recent state bidding or award information;
- 6.1.2.2 Providing commercial or competitive price information; and
- 6.1.2.3 Identifying the anticipated number of people who will be employed by the set aside contract.
- 6.2 Based on a majority vote, and after it has assured itself that the designed CNA and/or CRP has provided it with all of the necessary information, the Commission will review and respond to the CNA and/or CRP regarding the acceptability of the proposal for a set aside contract.

7.0 Approved Set Aside Contracts

- 7.1 To approve a set aside contract request, the majority of the members present at two properly-noticed and convened public meetings of the Commission must vote upon the request. If the request is deemed to be an urgent circumstance, the majority of the Commission members may vote to waive the waiting period and may approve the set aside contract request at one properly-noticed and convened public meeting.
- 7.2 Once the Commission has approved a set aside contract, it shall notify in writing GSS and the CRP, CNA, or both regarding the approval and provide to GSS a copy of the set aside contract.
- 7.3 GSS shall add the approved set aside contract to the procurement list of products and services and shall publish the procurement list on the State's "My Marketplace" website portal or on any other state electronic procurement advertising system.
- 7.4 The Commission, a CNA, a CRP, or GSS may recommend that a product or service be removed from the procurement list after the Commission has documented that the product or service is no longer needed. The removal of any product or service from the procurement list will depend on an analysis provided by GSS and on GSS' protocols for making such changes.
- 7.5 Set Aside Contract Promotion. In keeping with the scope and purpose of 16 Del.C. Ch. 96, the Commission may promote the purchase of products and services that are within approved set aside contracts and ensure that approved set aside contracts are published on the procurement list that is circulated to all State agencies and other government entities in the State of Delaware. The Commission, CRPs, and designated CNAs may monitor available spend data for State agencies to determine whether or not the products and services offered through the procurement list are procured from the set aside contract holder.

8.0 Changes to an Established Set Aside Contract

- 8.1 After an initial set aside contract has been established, the State or a CRP and/or its designated CNA may request the following changes:
 - 8.1.1 Price Changes and Modifications. The request must verify fair market value and employment impact by:
 - 8.1.1.1 Providing written substantiation for a price modification;
 - 8.1.1.2 Obtaining the most recent state bidding or award information;
 - 8.1.1.3 Providing commercial or competitive price information;
 - 8.1.1.4 Submitting a new cost analysis that highlights changes from the original set aside contract; and
 - 8.1.1.5 Providing updated or new information on the number of people employed by the set aside contract.
- 8.2 Transfer of Set Aside Contract. From time to time it may be necessary for a CNA or a CRP to cease performing a service or providing a product that is the subject of a set aside contract.
 - 8.2.1 If the contract is held by a CNA, the CNA may transfer the set aside contract to a different CRP as long as no modifications are made to the set aside contract. The CNA shall notify the Commission at its next regularly-scheduled meeting that the CNA has transferred the set aside contract to a different CRP.
 - 8.2.2 If the transfer of the set aside contract is from one CNA to another CNA, the transfer must be ratified by a majority vote of Commission members that are present at the next regularly-scheduled Commission meeting.
 - 8.2.3 If a CRP abandons a set aside contract or is unable to fulfill its contractual duties under a set aside contract, the CPR must immediately notify the Commission and Government Support Services.
 - 8.2.4 The transferring and receiving CRP and/or designated CNA must develop a detailed plan for the transfer of a set aside contract to ensure that there will be no disruption of service.

9.0 Request for Assignment Form

The following shall be the "Request for Assignment" form that must be used by a CNA or a CRP that wants to develop and research a new product or service for a set aside contract:

AGENCY:

DATE:

LIST PRODUCT(S) AND/OR SERVICE(S) TO BE ASSIGNED FOR DEVELOPMENT:

ESTIMATED TIME NEEDED TO DEVELOP:

COMMENTS:

ASSIGNMENT DATE:

NAME / TITLE:

REQUESTING AUTHORITY:

10.0 Effective Date

This regulation is effective ten days after publication in the Delaware *Register of Regulations*.

21 DE Reg. 424 (11/01/17) (Final)