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## MEMORANDUM

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**CC:** Aladdine Joroff, Emmett Environmental Law & Policy Clinic

**DATE:** February 8, 2021

**RE:** Promoting Equity in Offshore Wind Procurement

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## EXECUTIVE SUMMARY

This memorandum addresses how the Commonwealth can promote equitable economic opportunities in the statutorily required procurement of offshore wind power by electric utilities. Drawing on examples of economic equity programs in other states, specifically, New York, Pennsylvania, Maryland, Connecticut, Indiana, Rhode Island, and South Carolina, this memorandum discusses specific requirements that could be integrated into the Requests for Proposals (RFPs) for new offshore wind (OSW) development that the Department of Energy Resources (DOER) helps develop. Although this memorandum does not address the authority to include equity-related provisions in the RFPs, this issue was addressed in an Anderson & Krieger memorandum dated February 4, 2021.

The first section of the memorandum reviews two core approaches to promoting equity: (1) requiring non-numeric commitments to promoting diversity and equity, and (2) mandating numeric percentages of involvement by designated individuals, such as minorities, women or veterans, and/or designated types of business enterprises, such as minority business enterprises (MBEs) or businesses owned, in full or in part, by women or veterans. The latter approach may result in more specific outcomes, and be easier to enforce, but it can create a risk of legal challenges if the numeric requirements are not supported by existing data. As a result, it is advisable to combine any use of mandated numeric requirements with non-numeric commitments. The examples of equity-driving mechanisms in this section are primarily from programs in other states, however, while the memorandum does not include a detailed discussion of the Massachusetts Supplier Diversity Program (SDP), this could be a component of an equity program.

The second section of the memorandum discusses how to design an RFP so as to obtain responses/bids that will lead to equity-related objectives. For context, this section reviews the structure and relevant provisions of the RFPs used in the first two rounds of offshore wind procurement in Massachusetts, and how those policy choices led to concrete economic benefit commitments from Vineyard Wind and Mayflower Wind. The memorandum also explores how MassPort and programs in other states have designed RFPs to promote equity. While an RFP for OSW can integrate a wide array of requests for information and proposals for action regarding economic equity, there may be a limit on how that information can be used to evaluate the bids, and select a winner, in light of the statutory requirement for offshore wind procurement to be “cost effective.”

The final section of the memorandum briefly discusses several implementation issues that are relevant for drafting the next offshore wind RFP and implementing the subsequent economic equity-related commitments of a winning bidder. These issues range from defining terms, such as MBE, to assuring transparency in monitoring to providing mechanisms for enforcement by state entities and, if desired, members of the public. The following table summarizes examples of mechanisms that Massachusetts could utilize in its next offshore wind power procurement process. Here and throughout, the memorandum discusses MBEs, but the promotion of economic equity could also encompass (i) women, veteran, disable-owned and/or other types of business enterprises and (ii) the involvement of individuals as well as business entities.

**Table 1: Examples of Recommended Mechanisms**

<b>Leverage existing MBE infrastructure</b>	<ul style="list-style-type: none"> <li>- Incorporate Mass. Supplier Diversity Program (SDP) &amp; Supplier Diversity Office (SDO) in OSW development, <i>e.g.</i>, make use of certified lists of MBEs</li> <li>- Winning developer must comply with SDP (at a minimum), and/or must finalize equity plan in consultation with SDO</li> </ul>
<b>Require equity plans, including MBE utilization plans</b>	<ul style="list-style-type: none"> <li>- OSW bidders must submit detailed plans addressing, at least, how they will identify, assist, and hire MBE prime contractors</li> <li>- Bidders’ plans must include requirements for developers’ prime contractors to submit and report to developer and relevant state agencies on MBE utilization plans and/or minority hiring for subcontractors and laborers</li> </ul>
<b>MBE utilization goals and/or minority hiring goals</b>	<ul style="list-style-type: none"> <li>- Minority hiring: goals should exceed those in A&amp;F 14</li> <li>- MBE utilization rate: bidders should set ambitious goals based on MBE availability in OSW-adjacent industries</li> <li>- MBE investors: require good faith efforts to recruit MBE investors</li> <li>- Alternative: mandate specific percentages, supported by disparity study to be conducted by SDO or other state agency (accompany any specific mandates with requirements for non-specific mandates)</li> </ul>
<b>Encourage minority investor recruitment</b>	<ul style="list-style-type: none"> <li>Bids should include robust good faith efforts to recruit minority investors in OSW project (see Maryland legislation)</li> </ul>
<b>MBE outreach &amp; capacity building</b>	<ul style="list-style-type: none"> <li>- DOER writes plan, in consultation with SDO and the Massachusetts Clean Energy Center (MassCEC), for capacity building and outreach to aid MBEs in offshore wind industry (and/or clean energy in general);</li> <li>- DOER shares plan with legislature and public;</li> <li>- DOER regularly reports to legislature on plan’s implementation</li> </ul>

<b>Gov't &amp; developer staff dedicated to equity</b>	- Bidders' plans should identify dedicated staff among OSW developer's team who will focus on implementing equity plan - DOER, SDO, and/or MassCEC should assemble cross-agency team dedicated to equity and diversity
<b>Assistance &amp; Collaboration</b>	DOER, MassCEC, and SDO should meet regularly with OSW developer's equity team to assist with implementation (similar to Mass. Gaming's Access & Opportunity Committee's regular meetings with developers and others to address equity plan implementation issues as they came up)
<b>Accountability</b>	- Developer must report regularly to DOER & MassCEC on implementation of equity plan, including MBE utilization, minority investor recruitment, and any other equity commitments
<b>Transparency</b>	DOER must publish annual reports on achievement of equitable procurement/hiring in OSW industry, including implementation of both agencies' and OSW developer's equity plans
<b>Enforcement</b>	- Include developer equity commitments in a contract that is enforceable by a state agency/entity; consider opportunities for public enforcement - By means of carrots and/or sticks (as harsh as financial penalties), enforce OSW developer's equity commitments - By similar or other means, require/encourage OSW developer to enforce commitments of its prime contractors

**I. PROMOTING EQUITY IN THE OFFSHORE WIND PROCUREMENT**

Broadly speaking, there are two types of approaches to promoting equity in procurements. The first is to require commitments, by agencies and/or developers, to take actions, such as outreach to MBEs, and the second is to require the regulated party to meet or comply with specific targets, such as hiring of a specified number or percentage of MBEs. While the latter approach may create more certainty around outcomes, it may also require more information to properly design, *e.g.*, an accurate understanding of the number of available and qualified MBEs, and may be subject to legal challenges if such information is not adequately prepared in advance. Either approach could be combined with requirements for direct outreach to MBEs.

A procurement process could integrate both approaches, and in some instances, both approaches could be used towards the same objective. For example, an entity could be required to make good faith efforts to engage as many MBEs as possible *and* be required to ensure that a minimum percent of subcontractors are MBEs. While the examples in this section are primarily from statutes, analogous provisions or requirements could in many cases be integrated into RFPs.

**a. Requirements to Take Actions without Specific Outcomes**

Some state statutes promote MBE participation by requiring state agencies and contract bidders to make commitments to meet goals of diversity and economic equity. Because these commitments are not numerical quotas, compliance may be measured by qualitative criteria, such as "good faith efforts," and there may need to be a system to assess whether actions are sufficient for compliance. The requirements for agencies or developers to take actions to promote equity can take multiple forms, including outreach efforts or utilization plans that target MBE participation from the investment stage of a project to the selection of contractors and subcontractors. As illustrated in the examples below, RFPs can require minimum commitments,

but there are also opportunities for agencies and winning bidders to collaborate on developing equity-related plans. The table below summarizes these examples and shows the common features of the various states’ statutory schemes.

**Table 2: Types of Economic Equity Provisions in State Statute**

	<b>New York</b>	<b>Pennsylvania</b>	<b>Maryland</b>	<b>Virginia</b>
State agency commitment to MBEs	✓	✓	✓	✓
Private bidder commitments to MBEs	✓	✓	✓	✓
State agency review/reporting requirements	✓	✓	✓	
Private bidder review/reporting requirements	✓		✓	✓
Private bidder MBE investor requirement			✓	

**New York:** A state law governing the requirements for the participation of Minority and Women Business Enterprises in state contracting includes the following components:

- Requires state agencies to make a “good faith” effort to ensure that a “fair share” of state contracts to are awarded to MBEs;
- Directs the Division of Minority and Women’s Business Development to periodically review agency practices and procedures to determine compliance;
- Requires bidders, prior to the award of state contracts, to submit a “utilization plan” detailing “what measures and procedures he or she intends to take to comply with the provisions of [the law]”; and
- Provides MBE contractors a ten percent bidding credit for low-bid constructions projects that are up to \$1.4 million in value.<sup>1</sup>

In addition, state agencies are required to report on MBE contracting including projected growth plans, procurement strategies, and advocacy measures undertaken by the state

**Pennsylvania:** encourages utilities to award contracts and subcontracts to MBE contractors, including by establishing and maintaining “a subcontracting program for its prime contractors to utilize minority/women/persons with disabilities-owned business subcontractors.”<sup>2</sup> Purchase orders, RFPs, and other procurement documents must include the statement:

It is the policy of this utility that businesses owned by minorities, women and persons with disabilities should have an equal opportunity to compete for

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<sup>1</sup> See New York State Executive Law Article 15-A §§ 310–317 (“Article 15-A”) (governing the requirements for the participation of MWBEs in New York State contracting).

<sup>2</sup> 52 Pa. Code §§ 69.801–.809. (This is a regulation, not a statute.)

subcontracts. The contractor agrees to use its best efforts to carry out this policy to the fullest extent consistent with the efficient performance of this contract.<sup>3</sup>

Like New York, Pennsylvania monitors compliance with MBE commitments through the annual submission of MBE utilization plans. Agencies are required to submit utilization plans for their “short-term, midterm, and long-term plans,” and prime contractors are encouraged to submit subcontractor MBE participation plans to the relevant agency.<sup>4</sup>

**Maryland:** Offshore wind developers must:

- Comply with the state’s existing MBE program;
- Consult with the state Public Service Commission, Governor’s Office of Small, Minority, and Women’s Business Affairs, and the state Attorney General on the developer’s plan to achieve “reasonable and appropriate” MBE participation goals;<sup>5</sup>
- When seeking private investment, “solicit and interview a reasonable number of minority investors.”<sup>6</sup>

**Virginia:** This state imposes equity related requirements on utilities that construct their own offshore wind projects. Such utilities must:

- Aid “historically economically disadvantaged communities,”<sup>7</sup> defined as “communities in which a majority of the population are people of color” or a “low-income geographic area;”<sup>8</sup>
- Submit a plan to Virginia’s State Corporation Commission that describes how the utility will “giv[e] priority to the hiring, apprenticeship, and training of veterans..., local workers, and workers from historically economically disadvantaged communities;”<sup>9</sup>
- Consult with diversity-focused state agencies, among others, when developing the utilities’ equitable economic development plans.<sup>10</sup>

Compliance with requirements for agencies or private parties to take equity-related actions can be measured by both quantitative and qualitative approaches. For example, quantitative measures could include tracking the number of outreach efforts or counting funds or technical assistance given to MBEs. An approach to a qualitative assessment of compliance that is used in

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<sup>3</sup> 52 Pa. Code § 69.807(1).

<sup>4</sup> 52 Pa. Code § 69.806.

<sup>5</sup> DEPT. OF LEG. SERVICES, MD. GENERAL ASSEMBLY, FISCAL AND POLICY NOTE, SENATE BILL 442 (2020), at 2, [http://mgaleg.maryland.gov/2020RS/fnotes/bil\\_0002/sb0442.pdf](http://mgaleg.maryland.gov/2020RS/fnotes/bil_0002/sb0442.pdf).

<sup>6</sup> Md. Code Ann., Pub. Util. § 7-704.1; Md. Code Regs. 20.61.06.02K(3)(a).

<sup>7</sup> Va. Code Ann. § 56-585.1:1.D(iv).

<sup>8</sup> Va. Code Ann. § 56-576.

<sup>9</sup> Va. Code Ann. § 56-585.1:11.D.

<sup>10</sup> Va. Code Ann. § 56-585.1:11.D(iii).

several laws is to require regulated entities to take “good faith” efforts to take the required equity actions; this approach is discussed below.

### **1. Defining “good faith” efforts on diversity and equity**

New York and Rhode Island include “good-faith” language in their MBE utilization statutes. New York Article 15-A requires that state agencies “must evaluate ‘good-faith’ attempts to comply to MBE utilization,” and Rhode Island allows a waiver of its MBE utilization requirements if a bidder can show that it had “a good faith reason for failing to meet its requirements.”<sup>11</sup> In evaluating whether a good-faith effort to promote MBE participation has occurred, New York law requires consideration of whether the implementing agency:

- “attempted to unbundle state contracts and solicit bids from certified minority and women-owned businesses;”
- “considered encouraging joint ventures, teaming agreements, partnerships or other similar arrangements” to involve MBEs;” or,
- “developed selective bidder lists” to include MBEs<sup>12</sup>

In contrast, Rhode Island’s good-faith codes focus primarily on the bidder’s actions in relation to promoting MBE participation. A determination that a bidder has a “good faith reason for failing to meet its [MBE] requirements” can turn on whether it has, among other things:

- “provided written notice to a reasonable number of specific MBEs,”
- “selected portions of work to be performed by [MBEs] in order to increase the likelihood of meeting [MBE] participation requirements,” or
- “made suggestions to interested [MBEs] to assist them in obtaining bonding, lines of credit, or insurance required by the [b]idder.”<sup>13</sup>

By specifying in advance possible ways to comply with “good-faith” requirements, agencies can provide guidance to regulated entities about the positive steps they should take to promote economic equity.

### **b. Requirements to Meet Specific Targets**

#### **1. Advantages: Well-defined outcomes, simplified accountability**

As a complement or alternative to the types of equity-related actions discussed above, state programs can include mandates for agencies or private parties to meet specific targets, such as MBE set-aside programs that designate a certain percentage of contracts for MBE contractors. For instance, Rhode Island, Connecticut, and New York have adopted versions of these

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<sup>11</sup> R.I. Gen. Laws § 37-14.1-6; R.I. Code R. 80-10-2.8(G) (regulation).

<sup>12</sup> N.Y. Exec. Law § 313; N.Y. Comp. Codes R. & Regs. tit. 5, § 141.1.

<sup>13</sup> R.I. Code R. 80-10-2.8(G) (regulation).

programs. Some states treat them as aspirational goals, while others treat them as enforceable mandates.

New York's set-aside provision for utilization of MBEs in state contracts is an example of an aspirational goal. In 2014, Governor Andrew Cuomo announced a 30% MBE utilization goal for state agencies.<sup>14</sup> Each state agency is responsible for and required to have an "active master goal plan" to reach the 30 percent MBE utilization rate. Prior to award, bidders must collaborate with the awarding agencies on their plan to reach the utilization goal.<sup>15</sup>

Unlike New York, Rhode Island and Connecticut have established set-aside provisions as mandates. Rhode Island, for example, recently adopted a set-aside provision to ensure the involvement of MBEs in its public utility and public works procurement. It requires that MBEs be included in all procurement and construction projects and that they be "awarded a minimum of ten percent of a dollar value" of the contract. The statute requires the state agency responsible for a RFP to ensure that a prime contractor achieves its 10% aggregate utilization rate and designate a MBE coordinator for each RFP issued. Bidders are required to: 1) submit a statement acknowledging its obligation to meet the aggregate utilization rate in its bid or quote statement, 2) submit a compliance plan, and 3) appoint a MBE liaison officer who is responsible for coordinating with the governing state agency for the life of the contract.<sup>16</sup> The Department of Administration conducts on-site inspections to determine compliance with the provision, and has the authority to "impose sanctions upon contractors not in compliance" including the "recovery by the state of ten percent of the contract award price as liquidated damages" and denial of rights to participate in future projects for up to three years.

Similarly, Connecticut's set-aside mandate requires awarding agencies to set aside at least 6.25 percent of certain construction contracts for MBEs that are also small businesses. Specifically, 25 percent of the total value of these competitive bidding contracts must be set aside for small businesses, and then within that carved-out value, 25 percent "shall be reserved" for MBEs.<sup>17</sup>

## **2. Disadvantage: Pre-RFP disparity studies may be required**

A state MBE set-aside program may be subject to legal challenges, particularly to the extent the program mandates specific, numeric levels of MBE involvement, as a type of affirmative action that requires justification. A thorough legal analysis of this issue is beyond the scope of this memorandum, but the following briefly discusses the grounds for a possible challenge under the equal protection provisions of the federal Constitution. An objection based on this issue could be raised by third parties that object to the RFP (or its implementation), but the legality of

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<sup>14</sup> *Governor Cuomo Sets Highest MWBE State Contracting Goal in the Nation*, NEW YORK STATE (Oct. 1, 2014), <https://www.governor.ny.gov/news/governor-cuomo-sets-highest-mwbe-state-contracting-goal-nation-30-percent-state-exceeds-20>.

<sup>15</sup> N.Y. Exec. Law § 313; N.Y. Comp. Codes R. & Regs. tit. 5, § 141.1

<sup>16</sup> R.I. Gen. Laws § 37-14.1-6; R.I. Code R. 80-10-2.8

<sup>17</sup> CT Gen Stat § 4a-60g(b)(2).

any mandatory set-aside programs could also be raised by the Massachusetts Attorney General's office through its participation in the offshore wind procurement process.

The Supreme Court has treated mandatory set-aside programs as "racial classifications" that must withstand "strict scrutiny" for compliance with the federal Constitution's Equal Protection Clause. States bear the burden of showing that their programs are created with a "strong basis in evidence" that remedial action is warranted due to past "discriminatory exclusion."<sup>18</sup>

For example, a federal appellate court upheld an affirmative action program about promoting Black officers to sergeants in Boston's police force, based largely on a comparison between the actual number of Black sergeants with the number of Black police officers who had the minimal qualifications to become sergeants. The court found that while 4.5 percent of the police officers with the minimal qualifications were Black, only 0.45 percent of the actual sergeants were Black. This kind of "disparate impact" analysis "use[s] a numerical comparison [to] help identify a possibly unfair, discriminatory hurdle imposed between the eligible minority applicant and success."<sup>19</sup>

Accordingly, as evidentiary support for MBE programs, states often publish "disparity studies." Like the disparate impact analysis in the Boston police sergeant case, disparity studies compare MBEs' availability for the relevant work to MBEs' historic rates of participation in such work. In essence, if the availability exceeds the historic participation, the state may be justified in mandating numeric participation rates in line with MBEs' availability.

For instance, a New York law requires updates to a disparity study undergirding that state's MBE programs.<sup>20</sup> Similarly, in Maryland, "prior to each reauthorization of [Maryland's] MBE program, [the state] conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in [s]tate contracting."<sup>21</sup> And, in Massachusetts, a provision of the gaming law requires a type of disparity study to support a requirement that gaming licensees identify "specific goals, expressed as an overall program goal applicable to the total dollar amount or value of contracts entered into, for the utilization of" MBEs.<sup>22</sup>

In the context of offshore wind procurement in Massachusetts, to the extent the Commonwealth establishes mandatory, numeric rates for minority or MBE participation, regulators can lower litigation risk by identifying an existing, relevant disparity study, or creating a new one. Given that offshore wind is a burgeoning industry in Massachusetts, it is not possible to assess MBEs' historic participation in that industry in the Commonwealth. However, Massachusetts regulators could identify or create a disparity study based on contracting rates for

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<sup>18</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>19</sup> See *Stuart v. Roache*, 951 F.2d 446, 451 (1st Cir. 1991).

<sup>20</sup> See N.Y. Exec. Law § 312-a.

<sup>21</sup> DEPT. OF LEG. SERVICES, MD. GENERAL ASSEMBLY, FISCAL AND POLICY NOTE, SENATE BILL 442 (2020), at 7, [http://mgaleg.maryland.gov/2020RS/fnotes/bil\\_0002/sb0442.pdf](http://mgaleg.maryland.gov/2020RS/fnotes/bil_0002/sb0442.pdf).

<sup>22</sup> M.G.L. c. 23K, § 21(a)(21) ("the specific goals for the utilization of [MBEs] shall be based on the availability of such [MBEs] engaged in the type of work to be contracted by the gaming licensee").



construction and other work as similar as possible to known types of work relevant in the offshore wind industry.

Relatedly, in Maryland, as part of legislation applying the state’s MBE program to offshore wind development, a state agency must analyze a certain existing disparity study to “determine if it applies to the type of work likely to be performed by an approved offshore wind project.”<sup>23</sup> Before the law was passed, the Maryland Attorney General “approve[d] [it] for constitutionality and legal sufficiency.”<sup>24</sup> In reaching that conclusion, however, the Attorney General relied not only on the evidentiary support provided by the novel analysis of the existing disparity study, but also on “subsequent reports by the State’s disparity consultant that were presented to the General Assembly.”<sup>25</sup> This example of Maryland’s bill and the state Attorney General’s analysis of it illustrates the value of having a robust evidentiary record in support of any racially-based mandatory set-aside programs.

### **c. Direct Outreach to MBEs and Capacity Building**

In addition, and complementary to the actions discussed above, direct outreach to MBEs can help lower barriers to MBE economic participation. Massachusetts, like many other states, has a state-level MBE development program that certifies MBEs as eligible for state government procurement programs. In Massachusetts, the Supplier Diversity Office implements the state’s disadvantaged-business programs, certifies MBEs, and sets participation targets. Massachusetts can promote economic equity in offshore wind power procurement by directly engaging MBEs prior to the RFP and bidding process.

Direct outreach to MBEs is an important strategy to limit the barriers of economic involvement faced by MBEs. According to a 2016 report on contracting disparities by the United States Department of Commerce, general lack of network access is one of the main causes for MBE contracting disparities.<sup>26</sup> According to the report, MBEs often lack formal and informal networks that would facilitate greater access to public contracting opportunities. Barriers to network access may be discriminatory in nature – “employing capability stereotypes, double or higher standards” – or may be non-discriminatory – “large project sizes, bid qualifications, and timely payment.” For example, minority businesses stated that a major barrier to contract awards was that they “lack feedback on failed proposals.”

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<sup>23</sup> DEPT. OF LEG. SERVICES, MD. GENERAL ASSEMBLY, FISCAL AND POLICY NOTE, SENATE BILL 442 (2020), at 2, [http://mgaleg.maryland.gov/2020RS/fnotes/bil\\_0002/sb0442.pdf](http://mgaleg.maryland.gov/2020RS/fnotes/bil_0002/sb0442.pdf).

<sup>24</sup> Letter from AG Brian Frosh to Governor Hogan (Apr. 15, 2020), [http://mgaleg.maryland.gov/2020RS/ag\\_letters/sb0442.pdf](http://mgaleg.maryland.gov/2020RS/ag_letters/sb0442.pdf)

<sup>25</sup> *Id.*

<sup>26</sup> MINORITY BUSINESS DEVELOPMENT AGENCY, US DEPT. OF COMMERCE, CONTRACTING BARRIERS AND FACTORS AFFECTING MINORITY BUSINESS ENTERPRISES (2016), [https://www.mbda.gov/sites/default/files/migrated/files-attachments/ContractingBarriers\\_AReviewofExistingDisparityStudies.pdf](https://www.mbda.gov/sites/default/files/migrated/files-attachments/ContractingBarriers_AReviewofExistingDisparityStudies.pdf)

The Commerce Department argues that to reduce informational asymmetries resulting from network barriers, governments can use training and outreach to promote MBE participation, including by “creat[ing] centralized bidding notification hubs,” providing feedback for MBEs that did not win bids, and directly contacting MBE subcontractors and notifying them of bidding opportunities.<sup>27</sup> Provisions to encourage direct MBE outreach can be implemented in statutes, regulations, and/or in internal agency directives and can be required for large project developers, such as lead developers for OSW projects, as well as agencies.

## II. RFP DESIGN TO IMPLEMENT POLICY MECHANISMS

This section explores how the next Massachusetts offshore wind RFP could implement the foregoing policy ideas. As a baseline for that discussion, this section first presents how DOER and utilities structured the RFPs from the first two rounds of procurement, and the potentially relevant commitments made by winning bidders. The RFPs and related documents from the first two rounds of offshore wind procurement are available at the “83C” and “83C II” sections of <https://macleanenergy.com>.<sup>28</sup>

Both prior and future RFPs must comply with the Massachusetts statute governing offshore wind procurement. Known as “Section 83C,” the statute includes the following requirement:

[DPU] shall consider the potential costs and benefits of the proposed long-term contract and shall approve a proposed long-term contract if [DPU] finds that the proposed contract is a *cost-effective* mechanism for procuring reliable renewable energy on a long-term basis, *taking into account the factors outlined in [§ 83C]*.<sup>29</sup>

The two offshore wind RFPs issued to-date have explicitly noted the need to align with this statutory provision. Thus, in order for DPU to approve a long-term offshore wind contract, DOER and the utilities must ensure that the contract is cost-effective, taking into account the Section 83C factors.

For purposes of promoting economic equity, the most relevant Section 83C factor is that the selected offshore wind project must “where feasible, create and foster employment and economic development in the commonwealth.”<sup>30</sup> As discussed further below, this economic-benefits consideration was a “qualitative” factor in the prior RFPs.

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<sup>27</sup> *Id.*

<sup>28</sup> Direct link to first RFP: <https://macleanenergy.files.wordpress.com/2017/02/section-83c-request-for-proposals-for-long-term-contracts-for-offshore-wind-energy-projects-june-29-2017.pdf>. Direct link to second RFP: [https://macleanenergy.files.wordpress.com/2019/08/83crfpr2\\_with-appendices-revised-08.7.19.pdf](https://macleanenergy.files.wordpress.com/2019/08/83crfpr2_with-appendices-revised-08.7.19.pdf).

<sup>29</sup> Acts of 2016, Chapter 188, Section 83C(e) (“Energy Diversity Act” or “Section 83C”).

<sup>30</sup> Section 83C(d)(5)(xi). DOER also “shall give preference to proposals that demonstrate a benefit to low-income ratepayers in the commonwealth, without adding cost to the project.” Section 83C(d).

Because of the statute’s “taking into account” language, it is not perfectly clear what role the Section 83C factors must or can play in the cost-effectiveness analysis. But the statute’s text emphasizes cost-effectiveness. Thus, whatever role the other factors might play in the analysis, ultimately DPU must determine whether a proposed contract is cost-effective. In addition to emphasizing cost-effectiveness, the statute is silent as to whether the listed factors must carry equal weight or can be weighted differently. In theory, this could constrain how much the next RFP can prioritize evaluation and selection of bids based on economic equity factors.

**a. First OSW Procurements in Massachusetts**

Consistent with the statute, the RFP evaluation process in the first procurement, which consisted of two RFPs for 800 MW each, prioritized cost-effectiveness while also considering the Section 83C factors. In addition to those “mandated” factors, DOER and the utilities also considered other factors they “deemed important.” (The RFPs, however, do not clearly distinguish between the “mandated” and the “deemed important” factors. They are all “qualitative” factors.)

The RFPs established a three-stage bid evaluation process. Stage 2 is most important for purposes of this memorandum because it constituted the bulk of the RFP evaluation team’s assessment of each bid’s cost-effectiveness, taking into account the other factors. By contrast, Stage 1 involved “eligibility” and “threshold” criteria. The former were largely technical while the latter served to “screen out proposals” that, among other things, did “not satisfy the minimum requirements set forth in Section 83C” or were “not in compliance with RFP requirements.” In other words, the RFP team used threshold criteria to make sure a bidder provided all the requested information necessary to evaluate the bid. Stage 3 essentially involved reconsidering projects that made it past the first two stages.

**1. Stage 2: assigning quantitative and qualitative points<sup>31</sup>**

In Stage 2, a bid could earn up to 75 “quantitative” points and up to 25 “qualitative” points. Essentially, the “quantitative” analysis implements Section 83C’s cost-effectiveness requirement, while the “qualitative” one implements the statutory directive to “take into account” other factors.

Specifically, the quantitative analysis evaluated proposals’ “direct and indirect economic and environmental costs and benefits to ratepayers.” To compare these using a common metric, the costs and benefits were expressed as dollars per MWh. By contrast, the qualitative analysis evaluated both the mandatory Section 83C factors as well as the other factors deemed important by the RFP drafters.

Consistent with Section 83C’s emphasis on cost-effectiveness over the other factors, the RFPs prioritized the quantitative points over the qualitative ones:

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<sup>31</sup> In the first and second RFPs, Stage 2 is covered in pages 32–37 and 27–32, respectively.

[T]he quantitative evaluation may be conducted before the qualitative evaluation, and the Evaluation Team may elect not to conduct the qualitative evaluation for any proposal that could not be selected based upon the quantitative results even if it could receive the maximum possible qualitative score.<sup>32</sup>

As mentioned above, the RFP evaluation team considered a bidder's economic benefit commitments as a "qualitative" factor. The team grounded this factor in the statutory requirement that selected offshore wind projects must "where feasible, create and foster employment and economic development in the commonwealth."

## **2. "Bidder Response Forms" with detailed questions & instructions**

Accompanying each RFP, among other documents, was a bidder response form, which also appeared as an appendix in each RFP. These forms have specific, detailed instructions and questions for bidders. In each form, instructions concerning economic benefit commitments are in section 14.<sup>33</sup>

## **3. Economic benefit commitments (qualitative factor)**

In each RFP, economic benefit commitments appeared as both a Stage 1 "threshold" criterion, and as a Stage 2 "qualitative" factor.

Particularly in the Stage 2 sections on economic benefits, the second RFP included somewhat more detail than the first. The full text of each RFP's economic benefits language is included in Appendix B, including the Stage 1 and 2 language, as well as the instructions/questions from each round's bid response form. For purposes of integrating economic equity, the two most relevant items that were added in the second RFP were commitments to investing in workforce development and in "economically distressed areas." Importantly, comparing the first and second RFPs' economic benefits language suggests the drafters' increased willingness to discuss those commitments in more detail and to incorporate "economically distressed areas."

## **4. Results of the First RFPs: Actual economic benefit commitments from Vineyard Wind & Mayflower Wind**

Vineyard Wind and Mayflower Wind, the winners of the first two RFPs for offshore wind, enshrined the economic development commitments from their bids into agreements separate from their long-term energy contracts (but these agreements were only effective upon approval of the energy contracts).<sup>34</sup> For example, Vineyard Wind committed at least \$15 million to

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<sup>32</sup> First RFP, at 37; Second RFP, at 32.

<sup>33</sup> In the first RFP, these economic benefits instructions are in Appendix B, pages B-20–B-21. In the second RFP, these instructions are in Appendix A, Section 14 (this appendix does not have page numbers).

<sup>34</sup> We were not able to find Vineyard Wind's separate economic benefits agreement, but it is identified as the "Definitive Documentation" in a letter the company sent DOER. That letter is online at

improve economic development within Massachusetts, including a \$2 million commitment to “recruit, mentor, and train” residents, and a \$10 million commitment to utilize in-state supply chain businesses.<sup>35</sup> Likewise, Mayflower Wind committed to invest in applied research for Massachusetts institutions of higher education and create workforce development training programs for residents.<sup>36</sup> Although these plans do not currently include commitments to diversity and MBE utilization, these commitments indicate that offshore wind companies are willing to invest a significant amount of money into communities as a condition for contract awards.

#### **b. Ideas for Structuring RFP for Next OSW Procurement in Massachusetts**

There are opportunities for the next RFP for offshore wind to build on the process utilized in the first rounds of RFPs by integrating many of the tools discussed in Section I of this memorandum. Although not necessarily exhaustive, the following reviews ideas from another Massachusetts program (Massport) and several other states for how to structure the RFPs. While useful as examples, approaches from other programs can not necessarily be integrated wholesale into RFPs for offshore wind, but must instead be consistent with the statutory framework governing the OSW RFP process.

In Massachusetts, the RFP issued by the Massachusetts Port Authority (MassPort) for development on the South Boston Waterfront used a numerical approach to evaluating bids, stating that the agency would select bids on four equally weighted criteria: 1) the ability to execute the project; 2) the programs design and public contribution; 3) the comprehensive diversity and inclusion program; and 4) the ground rent proposal and finance plan. (Section 4.4.2). In considering diversity programs, MassPort evaluated not only MBE subcontractor involvement, but also the “quality of programs” and the “local commitment and community outreach.”<sup>37</sup>

Importantly, the Stage 2 evaluation used in the previous offshore wind RFPs assigned 25 points to *all* qualitative factors, including economic benefits. This approach would need adjustment in the next offshore wind RFP if DOER wanted to use the Massport approach as a model.

In New York, Indiana, and South Carolina, state agencies promote economic equity by weighing a bidder’s commitment to increasing MBE participation as part of the bid selection process. For instance, the RFPs for the Indiana Gaming Commission and the New York State

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<https://vineyardwind.app.box.com/s/lqtax59cyt4zlr608vctn79hahkhqod>. Mayflower Wind’s separate agreement is online: <https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/12167376>.

<sup>35</sup> *Committing \$15m to make Massachusetts the Center of Offshore Wind Industry*, Vineyard Wind, <https://www.vineyardwind.com/masswinds>.

<sup>36</sup> *Core Initiatives*, Mayflower Wind, <https://mayflowerwind.com/our-commitment/initiatives>.

<sup>37</sup> PARCEL H DEVELOPMENT PROJECT, MASSACHUSETTS PORT AUTHORITY, June 27, 2019, <http://www.massport.com/rfpattachments/770cd19a-83ef-4341-b141-2bbf3664a505/01%20-%20Parcel%20H%20RFP%2006-27-2019.pdf>.

Gaming Commission articulate percentage point systems used to evaluate the diversity practices of bidders.<sup>38</sup> In New York, as Maryland does through statute, the gaming commission RFPs require that bidders comply with New York’s general MBE program embodied in Article 15-A. Again, Massachusetts could consider requiring offshore wind bidders to comply with the state’s Supplier Diversity Program. New York gaming bidders must also commit to the state’s “diversity practices,” which are defined as “utilizing” and “entering into partnerships, joint ventures or other similar arrangements” with MBEs.

In the evaluation of a New York gaming bidder’s proposal, diversity is assigned a specific number of percentage points. The gaming commission weighs the technical capabilities of a bidder at 70 percentage points of the total evaluation, and the pricing evaluation of the bid as the remaining 30 percent. RFPs dictate, though, that a bidder’s commitment to “diversity practices” makes up 5 percentage points within the technical evaluation portion.<sup>39</sup> Similarly, RFPs from the Indiana Gaming Commission assign 5 percentage points of the total evaluation of a bidder’s proposal to their involvement with MBE subcontractors and another 5 percentage points of the use of WBE subcontractors.<sup>40</sup>

Some states, like South Carolina, use diversity metrics for tie breakers within public works bidding. In South Carolina, commitments to diversity are weighed only when “two or more bidders are tied in price while otherwise meeting all of the required conditions.” In case of a tie preference is given to a bidder that involves MBEs.<sup>41</sup>

### III. IMPLEMENTATION ISSUES

This section briefly outlines issues related to implementing any of the policy mechanisms discussed above in the context of offshore wind procurement in Massachusetts. (Some of these ideas are noted in the discussion of examples from other state laws discussed in Part I.) Although this is not an exhaustive list of implementation issues, it underscores that there are opportunities to promote economic equity throughout the lifecycle of an offshore wind project, *e.g.*, from developing the RFP to awarding bids to long-term reporting and enforcement.

- **Dedicated staff and ongoing assistance/collaboration:** Likely one of the most important implementation ideas is to have dedicated personnel in charge of carrying out any diversity/equity programs, both on the state agency side and the developer side, and to ensure regular collaboration between those dedicated staff members, including other key stakeholders as well, to address difficulties as they come up and generally to assist in the implementation process. According to the Massachusetts Gaming Commission (MGC), this strategy was critical in its implementation of diversity/equity programs. A

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<sup>38</sup> NEW YORK STATE GAMING COMMISSION, REQUEST FOR PROPOSALS (2019), <https://gaming.ny.gov/pdf/Procurement/VLT%20CS%20RFP%202019.pdf>; STATE OF INDIANA, REQUEST FOR PROPOSAL 19-047 (2019), <https://www.in.gov/idoa/proc/bids/rfp-19-047/047RFP.pdf>.

<sup>39</sup> New York gaming RFP, at 81.

<sup>40</sup> Indiana gaming RFP, at 34.

<sup>41</sup> S.C. Code Ann. § 11-35-1520.

helpful report on that experience is *Built to Last: Best Practices for Diversity in the Construction Industry, the Massachusetts Casino Development Experience*.<sup>42</sup> This blog post hits the key points as well: *MGC Honors Access and Opportunity Committee as Encore Boston Harbor Presents Complete Construction Diversity Results*.<sup>43</sup> The blog post underscores this strategy's importance by quoting one of the lead agency-side staffers dedicated to equity: "The Access and Opportunity Committee was the pivotal diversity strategy of the Massachusetts Gaming Commission, providing monthly oversight of the licensee's progress towards their diversity goals, along with strategic interventions and advice," said Jill Griffin, the MGC's Director of Workforce, Supplier and Diversity Development."

- **Defining equity, diversity, etc.:** Like other states, Massachusetts has defined "minority business enterprise", at least in the context of the Supplier Diversity Program.<sup>44</sup> Appendix A includes some examples of definitions used by Massachusetts and some other states. In addition, New York defines "diversity practices"—this language is also in Appendix A. While existing definitions may be informative for an offshore wind RFP, they are not binding. However, whatever definition is used, DOER and the utilities should ensure that regulators and the selected offshore wind developer are using the same definitions of MBE and other relevant terms, for instance in any equity plans prepared by the developer and/or DOER. Relatedly, to the extent the offshore wind RFP incorporates references to, or utilizes, the Supplier Diversity Program, the RFP should specify if it is applying a different definition of MBE.
- **Clarifying whether requirements apply to agencies, the offshore wind developer, prime contractors, etc.:** In general, it will be beneficial to clarify which requirements apply to state agencies, offshore wind developer and/or subcontractors, or how the same requirement might vary when applied to one or the other. For instance, an MBE utilization plan makes the most sense when applied to the developer—*i.e.*, the plan would lay out how the developer will identify and contract with MBEs. By contrast, as applied to DOER, for instance, an equity plan might include regularly providing information about MBEs to the developer, outreach to MBEs, and/or other training and capacity building programs geared towards MBEs who are potentially available for work in the offshore wind industry.

The states discussed above have a mix of requirements on state agencies and on contractors. For instance, as part of a state's general MBE programs, state agencies are sometimes required to assign a certain percentage of contracts to MBEs. A program like that is not a perfect fit for the Commonwealth's next offshore wind procurement, which will only involve one contract bidding process and one selected developer. However,

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<sup>42</sup> <https://massgaming.com/wp-content/uploads/Built-to-Last-Best-Practices-for-Diversity-in-the-Construction-Industry.pdf>

<sup>43</sup> <https://massgaming.com/blog-post/mgc-honors-access-and-opportunity-committee-as-encore-boston-harbor-presents-complete-construction-diversity-results>

<sup>44</sup> M.G.L. c. 7, § 58.

DOER could require, or encourage, the developer to seek out and hire MBE contractors, in the same way that states' general MBE plans require such steps from state agencies.

- **Leveraging existing tools, resources, and programs in Massachusetts:** The offshore wind procurement process should leverage any existing resources or programs related to equity and diversity. Most obviously, DOER could collaborate with SDO, or require or encourage the selected developer to consult with SDO in crafting its equity plan.

Regulators and the utilities should also consider the involvement of the Massachusetts Clean Energy Center (MassCEC). In the first two RFP processes, MassCEC and the developers were the signatories to the contract (separate from the power purchase agreement) that included the developers' economic benefit commitments.

- **Monitoring / reporting / transparency:** DOER, SDO, and/or MassCEC should regularly monitor the developer's progress towards achieving its equity goals. Most plainly, this could take the form of requiring regular reports from the developer.

DOER, and/or the other state entities, should also regularly report to the state legislature with (1) summaries of the developers' reports and (2) reports on any of the kind of equity/diversity requirements imposed on the agencies themselves. More targeted reporting could also be useful, including to state entities that are already tracking economic equity-related metrics.

For the sake of transparency, the state entities and/or the developer should publish these reports and make them easily accessible by the public, for instance on one website.

- **Enforcement:** Whichever equity-related policies are adopted, it should be clear by what means the commitments have been made and who has the right to enforce them. Equity-related commitments should continue to be made in a contract other than the power purchase agreement. Such contract should include a government signatory, such as DOER, MassCEC or SDO, and should explicitly provide that a developer's failure to comply with the terms of the contract can be enforced by the government signatory on behalf of the Commonwealth. Opportunities for enforcement by the Attorney General's Office or members of the public should also be explored. This contract could include enforcement mechanisms, *e.g.*, penalties on the developer for failing to achieve targets or take "good faith" efforts. In the event of repeated failure to comply with equity-related commitments, there could be a mechanism for a government entity to oversee certain actions, such as oversee MBE-outreach, that the developer had committed to undertake.

#### IV. NEXT STEPS

To the extent the recommendations for the next offshore wind RFP includes the use of mandated set-asides for MBEs and/or minority participation, it could be prudent to develop a record that supports the use of such set-aside programs. This could entail identifying existing studies that examine the availability and participation of MBEs in procurement and contracting in fields that parallel the roles that contractors and subcontractors will play in the development of



offshore wind. If sufficient existing studies do not exist, a new study could be conducted; such analysis would arguably be useful even if completed after the RFP is written.

## V. APPENDIX A: OTHER STATES' STATUTORY PROVISIONS

### a. Definitions of Diversity & MBEs

**New York:** "Diversity Practices" are when an agency utilizes certified minority and women-owned business enterprises in contracts awarded by a state agency or other public corporation, as subcontractors and suppliers; and enters into partnerships, joint ventures or other similar arrangements with certified minority and women-owned business enterprises as defined in this article or other applicable statute or regulation governing an entity's utilization of MBEs *See* New York State Gaming Commission RFP, <https://gaming.ny.gov/pdf/Procurement/VLT%20CS%20RFP%202019.pdf>

### **Minority Business Enterprises (MBE)**

- **Massachusetts:** " 'Minority business enterprise' or 'MBE', for the purpose of receipt of services from SDO, means a business enterprise that is owned and controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, African Americans, Cape Verdeans, Western Hemisphere Hispanics, Asians, American Indians, Eskimos, and Aleuts. For purposes of section 61 and of section 40N of chapter 7, the term 'minority owned business' shall have the same meaning as 'minority business enterprise'." M.G.L. c. 7, § 58.
- **Rhode Island:** "Minority business enterprise" means a small business, as defined pursuant to § 3 of the federal Small Business Act, 15 U.S.C. § 632, and implementing regulations, which is owned and controlled by one or more minorities or women. *See* RI Gen L § 37-14.1-6 (2019)
- **New York:** "Minority-owned business enterprise" shall mean a business enterprise that is: (a) at least fifty-one percent owned by one or more minority group members; (b) an enterprise in which such minority ownership is real, substantial and continuing; (c) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (d) an enterprise authorized to do business in this state and independently owned and operated; (e) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed fifteen million dollars, and such other amount as the director shall set forth in regulations, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (f) an enterprise that is a small business pursuant to subdivision twenty of this section. *See* New York Executive Law Article 15-A
- **Connecticut:** "Minority business enterprise" means any small contractor (A) fifty-one per cent or more of the capital stock, if any, or assets of which are owned by a person or persons (i) who exercise operational authority over the daily affairs of the enterprise, (ii)

who have the power to direct the management and policies and receive the beneficial interest of the enterprise, and (iii) who are members of a minority (B) who is an individual with a disability, or (C) which is a nonprofit corporation in which fifty-one per cent or more of the persons who (i) exercise operational authority over the enterprise, and (ii) have the power to direct the management and policies of the enterprise are members of a minority, as defined in this subsection, or are individuals with a disability. *See* CT Gen Stat § 4a-60g (2012)

- **Pennsylvania:** A business enterprise that is at least 51% owned by a minority individual or group or individuals; or a publicly-owned business that has at least 51% of its stock owned by one or more minority individuals, and whose management and daily business operations are controlled by these individuals. "Minority" may include African-Americans, Hispanic-Americans, Native Americans and Asian Americans, as well as other groups found to be disadvantaged under section 8(a) of the Small Business Act (15 U.S.C.A. § 637(d)). *See* 52 Pa. Code § 69.802

**b. Economic equity provisions**

**New York:** Requires the Director to promulgate rules and regulations to ensure that minority and women-owned firms are awarded a "fair share" of state contracts. These rules require contractors to submit a minority and women-owned business enterprise ("MWBE") utilization plan for each of their contracts; require agencies to review these utilization plans for compliance and notify contractors of deficiencies; allow contractors time to correct the noted deficiency and or request a complete or partial waiver of compliance with goal requirements; agencies must evaluate "good faith" attempts to comply in deciding whether to grant or deny waiver requests; grant contractors a right to submit a complaint to the Director when an agency fails or refuses to issue a requested waiver, and similarly, allow agencies to submit a complaint to the Director for contractor noncompliance. *See* New York Executive Law Article 15-A

**Pennsylvania:** The Commission encourages major jurisdictional utility companies to implement diversity programs. This effort may include the following:

- a) The articulation of a corporate policy by the senior executives of the major jurisdictional utility company committing the utility to improving its level of diversity in the workplace and within its procurement process.
- b) The development and implementation of a corporate-wide diversity program with specified goals and objectives for each year.
- c) The appointment of utility managers to be responsible for the success of the program.
- d) The training of managers regarding implementing diversity initiatives in the areas of employment and contracting for goods and services.
- e) The location of qualified minority/women/ persons with disabilities-owned business contractors and mentoring, partnering and training qualified women/minority/persons with disabilities-owned businesses contractors to serve the needs of the major jurisdiction utility company.

52 Pa. Code § 69.803

**Maryland:** If an applicant is seeking investors in a proposed offshore wind project, it shall take the following steps before the Commission may approve the proposed project:

1. make serious, good-faith efforts to solicit and interview a reasonable number of minority investors;
2. as part of the application, submit a statement to the Commission that lists the names and addresses of all minority investors interviewed and whether or not any of those investors have purchased an equity share in the entity submitting an application;
  - a. as a condition to the Commission's approval of the offshore wind project, sign a memorandum of understanding with the Commission that requires the applicant to again make serious, good-faith efforts to interview minority investors in any future attempts to raise venture capital or attract new investors to the offshore wind project; and
  - b. as a condition to the Commission's approval of the offshore wind project, sign a memorandum of understanding with the Commission that requires the applicant to use best efforts and effective outreach to obtain, as a goal, contractors and subcontractors for the project that are minority business enterprises, to the extent practicable, as supported by a disparity study.

Md. Code Ann., Pub. Util. § 7-704.1

**Virginia:** In constructing any offshore wind facility “the utility shall develop and submit a plan to the Commission for review that includes the following considerations:

- options for utilizing local workers;
- the economic development benefits of the project for the Commonwealth, including capital investments and job creation;
- consultation with the Commonwealth's Chief Workforce Development Officer, the Chief Diversity, Equity, and Inclusion Officer, and the Virginia Economic Development Partnership on opportunities to advance the Commonwealth's workforce and economic development goals, including furtherance of apprenticeship and other workforce training programs; and
- giving priority to the hiring, apprenticeship, and training of veterans, as that term is defined in § 2.2-2000.1, local workers, and workers from historically economically disadvantaged communities.”

Va. Code Ann. § 56-585.1:11

**c. “Good-faith” provisions**

**New York:** “State agencies' good faith efforts. (a) State agencies shall make a good faith effort to meet the maximum feasible portion of the State agency's goals adopted pursuant to this title.

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

- a. whether there are certified minority- and/or women-owned business enterprises that could participate in the type of procurement opportunities that the agency has to offer as prime contractors or subcontractors;
- b. whether the State agency has attempted to unbundle State contracts and solicit bids from the certified minority- and women-owned businesses;

- c. whether there are certified minority- and/or women owned business enterprises, located outside of the regions in which State contracts are to be performed, that could participate in procurement opportunities; 18  
whether the state agency has considered encouraging joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and certified minority-and women-owned business enterprises to participate in the State agency's procurement opportunities;
- d. (5) the number of opportunities that the State agency had to make discretionary purchases from certified minority- and women-owned business enterprises versus the number of times the State agency actually made discretionary purchases from certified minority- and women-owned business enterprises;

N.Y. Exec. Law § 313; N.Y. Comp. Codes R. & Regs. tit. 5, § 141.1

**Rhode Island:** The state “may issue a good faith waiver which shall exempt the Bidder from meeting its MBE/WBE requirements. To determine whether a Bidder has a good faith reason for failing to meet its requirements, the Division may consider, among other factors:

- e. Whether the Bidder attended any pre-solicitation or pre-bid meetings that were scheduled by the Division to inform MBEs/WBEs of contracting or subcontracting opportunities;
- f. Whether the Bidder advertised in general circulation, trade association, and minority focus media concerning the subcontracting opportunities;
- g. Whether the Bidder provided written notice to a reasonable number of specific MBEs/WBEs that their interest in a contract was being solicited, in sufficient time to allow the MBEs/WBEs to participate;
- h. Whether the Bidder followed up with MBEs/WBEs that showed an initial interest by contacting the firms to determine whether they were interested;
- i. Whether the Bidder selected portions of work to be performed by MBEs/WBEs in order to increase the likelihood of meeting MBE/WBE participation requirements (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE/WBE participation);
- j. Whether the Bidder provided interested MBEs/WBEs with adequate information about the plans, specifications and requirements of the contract”

220 R.I. Code R. 80-10-2.8

**d. Enforcement Provisions**

**1. Rhode Island:**

- a. Continued on-site inspections - the “Agency's MBE/WBE Coordinator are permitted to periodically conduct on-site inspections to determine compliance with the provisions of R.I. Gen. Laws Chapter 37-14.1 and § 2.8 of this Part. The Division, ODEO, or the Using Agency's MBE/WBE Coordinator may require a Bidder to furnish copies of purchase orders, subcontracts, cancelled checks, and other records needed to substantiate a Bidder's compliance with its approved MBE/WBE Compliance Plan.”
- b. Enforcement – “The director of the department of administration shall have the power to impose sanctions upon contractors not in compliance with this chapter

and shall include but not be limited to: (1) Suspension of payments; (2) Termination of the contract; (3) Recovery by the state of ten percent (10%) of the contract award price as liquidated damages; and (4) Denial of right to participate in future projects for up to three (3) years.”

37 R.I. Gen. Laws Ann. § 37-14.1-8

## **VI. APPENDIX B: RFPs IN MASSACHUSETTS FIRST OFFSHORE WIND PROCUREMENT**

To see how the second RFP expanded somewhat on the first in terms of economic benefit commitments, compare the two Stage 2 sections below.

### **a. First round RFP**

#### **1. Stage 1 threshold criteria (p. 30)**

##### **2.2.2.8 – Contribution to Employment; Economic Development Benefits**

Section 83C requires that, where feasible, a proposed project demonstrate that it creates additional employment and economic development in the Commonwealth. This requirement can be satisfied, for example, by a showing of:

1. Direct employment benefits associated with the proposed project; or,
2. Indirect employment benefits associated with the proposed project; or,
3. Other economic development benefits associated with the proposed project.

The Evaluation Team will consider a broad range of other economic development benefits that could be achieved by a proposed project, including, for example, creating property tax and lease payment revenues, commitments to local workforce training, and providing Offshore Wind Energy Generation at lower costs than other potential projects, and potential environmental benefits to ratepayers. The proposal shall include a timeline of the short-term and long-term economic development benefits.

#### **2. Stage 2 qualitative factor (p. 37)**

##### **2.3.2(v) – Economic Benefits to the Commonwealth**

- Demonstrated ability to create and foster employment and economic development in the Commonwealth, where feasible, including:
  - Direct and/or indirect employment benefits associated with the proposed project; and/or,
  - Specific commitments to economic activity in the Commonwealth, such as leases for water-side facilities and other properties, capital investment, local manufacturing or outfitting of project such as turbine foundations, or use of local suppliers and service providers.
- Demonstrated benefits to low-income ratepayers without adding cost.

The quantitative evaluation may be conducted before the qualitative evaluation, and the Evaluation Team may elect not to conduct the qualitative evaluation for any proposal that could not be selected based upon the quantitative results even if it could receive the maximum possible qualitative score. The Evaluation Team will determine which proposals proceed to Stage Three following the Stage Two evaluation based on the following considerations: (1) the rank order of the proposals at the end of the Stage Two evaluation;

(2) the cost effectiveness of the proposals based on the Stage Two quantitative and qualitative evaluation; and (3) the total MW quantities of the proposal(s), relative to the procurement target

**3. Bidder response form economic benefits section (RFP App. B, pp. B-20–B-21)**

**Section 14 – Contribution to Employment and Economic Development and Other Direct and Indirect Benefits**

- 14.1** Please provide an estimate of the number of jobs to be created directly during project development and construction, and during operations, and a general description of the types of jobs created, estimated annual compensation, the employer(s) for such jobs, and the location. Please treat the development, construction, and operation and maintenance periods separately in your response.
- 14.2** Please provide the same information as provided in response to question 14.1 above but with respect to jobs that would be indirectly created as a result of the proposed project.
- 14.3** Please describe any other economic development impacts (either positive or negative) that could result from the proposed project, such as creating property tax revenues, creating lease revenues to public and private parties, or purchasing capital equipment, materials or services for local businesses. Please provide the location(s) where these economic development benefits are expected to occur.
- 14.4** Please describe any tracking or reporting mechanisms, such as an annual report(s) of milestones achieved and jobs created, to verify the contributions to employment and economic development identified in 14.1, 14.2 and 14.3.
- 14.5** To the extent not already specified elsewhere in your response, please address the factors listed in Section 2.2.2.7 and describe any benefits or impacts associated with the proposed project.
- 14.6** Please demonstrate any benefits to low-income ratepayers in the Commonwealth, and the impact, if any, those benefits will have on the cost to the project.

**b. Second round RFP**

**1. Stage 1 threshold criteria (pp. 25–26)**

**2.2.2.8 – Contribution to Employment; Economic Development Benefits**

Section 83C requires that, where feasible, a proposed project demonstrate that it creates additional employment and economic development in the Commonwealth. This requirement can be satisfied, for example, by a showing of:

1. Employment benefits associated with the proposed project; or,



2. Other economic development benefits associated with the proposed project.

The Evaluation Team will consider a broad range of other economic development benefits that could be achieved by a proposed project. The proposal shall include a timeline of the short-term and long-term economic development benefits. The bidder should be prepared to provide factual support for its employment and economic development projections, and reflect any associated commitments in agreements with applicable governmental and non – governmental entities.

**2. Stage 2 qualitative factor (p. 30)**

**2.3.2(i) – Economic Benefits to the Commonwealth**

Demonstrated ability and commitment to create and foster employment and economic development in the Commonwealth, where feasible, which may include but is not limited to:

- Direct, measurable employment benefits associated with the proposed project;
- Specific commitments to economic activity (project expenditures), including but not limited to
  - Investment in supply chain and infrastructure improvements to support the offshore wind industry, for example commitment to contribute to the Offshore Wind Accelerator Fund that supports the economic development activities for the offshore wind industry.
  - Investment in workforce development and environmental research facilities to support offshore wind industry.
  - Commitment to utilize port facilities and office space during project development, deployment during construction, and operation and maintenance of the project.
  - Investment in economically distressed areas.

Commitments will be evaluated on scale, credibility, firmness, and by the degree or extent the benefits are memorialized in binding commitments or agreements.

Commitments that secure long-term benefits are preferred.

**3. Bidder response form economic benefits section (RFP App. A, Section 14)<sup>45</sup>**

**Demonstrated, Verifiable Commitment to Create and Foster Employment and Economic Development and Other Direct Benefits**

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<sup>45</sup> Appendix A in the second round RFP does not have page numbers.

- 14.1** Please provide an estimate of the number of jobs to be created directly during project development and construction, and during operations, and a general description of the types of jobs created, estimated annual compensation, the employer(s) for such jobs, and the location. Employment impacts should be broken out by state and the region as a whole and highlight any impacts in economically distressed areas. Please treat the development, construction, and operation and maintenance periods separately in your response. All information provided must be measurable.

Please describe the status of any contractual commitments with respect to direct job creation and provide any pertinent agreements that have been executed.

- 14.2** Please describe and quantify any other economic activity or development expected to result directly from the proposed project. Impacts should be broken out by state and the region as a whole and highlight any impacts in economically distressed areas. Direct economic activity/development will be evaluated based on scale, credibility and firmness. Commitments that secure long-term benefits are preferred. Commitments will be evaluated by the degree or extent to which the asserted benefits are contractually committed to by the bidder. Specific commitments to economic activity or development should include (but are not limited to):

- Investment in supply chain and infrastructure improvements to support the offshore wind industry, for example, commitment to contribute to the Offshore Wind Accelerator Fund that supports the economic development activities for the offshore wind industry;
- Investment in workforce development and environmental research facilities to support the offshore wind industry;
- Commitment to utilize port facilities and office space during project development, deployment during construction, and operation and maintenance of the project.

Please describe the status of any contractual commitments with respect to economic development and provide any pertinent agreements that have been executed.

- 14.3** Please describe any tracking or reporting mechanisms, such as an annual report(s) of milestones achieved and jobs created to verify the contributions to employment and economic development identified in 14.1, 14.2.
- 14.4** To the extent not already specified elsewhere in your response, please address the factors listed in RFP Section 2.3.2.i and describe any benefits or impacts associated with the proposed project.
- 14.5** Please demonstrate any benefits to low-income ratepayers in the Commonwealth, and the impact, if any, those benefits will have on the cost to the project. Please provide any agreements to effectuate those benefits.