

Minnesota Attorney General: Administrative Rules Proceedings

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STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Emergency Rule Amendments Relating to the Small Business Procurement Program

NOTICE OF WITHDRAWAL FROM CONSIDERATION BY ATTORNEY GENERAL

Please take notice that the Department of Administration hereby withdraws the above-captioned emergency rule for consideration by the Attorney General on September 26, 1990. The emergency rule will be resubmitted to the Attorney General's Office after correction and resolution of the legal concerns.

Sandra J. Hale

SANDRA J. HALE
Commissioner of Administration

Dated: September 24, 1990.

Department of Administration

Adopted Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

Rules as Adopted

1230.0100 SCOPE.

Pursuant to Minnesota Statutes, chapter 16B, parts 1230.0100 to 1230.1910 govern the procurement of materials and services for the state under the competitive bidding requirements.

SMALL BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts 1230.1400 to 1230.1910 are adopted pursuant to Minnesota Statutes, sections 16B.19 to 16B.22 for the purpose of governing procurement procedures relating to the preference programs for targeted group or economically disadvantaged area small businesses. These programs are administered by the Materials Management Division, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

1230.1500 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and parts 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern.

1230.1550 DEFINITIONS.

Subpart 1. **Scope.** The definitions contained in part 1230.0200 shall apply in the administration of these preference programs. The definitions in subparts 2 to 25 shall also apply.

Subp. 2. **Affiliate or subsidiary of a business dominant in its field of operation.**

A. "Affiliate or subsidiary of a business dominant in its field of operation" means a business that is at least 20

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percent owned by a business dominant in its field of operation or by partners, officers, directors, majority stockholders, or their equivalent of a business dominant in that field of operation.

B. "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in part 1230.1600, subpart 3.

Subp. 3. **Broker.** "Broker" means a business that carries no inventory and that has no written ongoing agreement with any manufacturer or manufacturer's authorized distributor to sell the products of the manufacturer.

Subp. 4. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 5. **Contractor.** "Contractor" means a business that is engaged in construction such as general, mechanical, and/or electrical contracting, or that provides a specific service such as trash removal, snow removal, janitorial services, or consultant, professional, or technical services.

Subp. 6. **Dealer, jobber, or distributor.** "Dealer," "jobber," or "distributor" means a business that maintains a store, warehouse, or other establishment in which a line or lines of products are kept in inventory and are sold to the public on a wholesale and/or retail basis.

Subp. 7. **Debarment.** "Debarment" means the disqualification of a person to receive invitations for bids or requests for proposals, or the award of any contract by any governmental body, for a specified period of time commensurate with the seriousness of the offense, the failure, or the inadequacy of performance.

Subp. 8. **Director.** "Director" means director of the Materials Management Division or a materials management division manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Material Management

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Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means any operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, which does not provide the operator with the exclusive right to profit from his or her effort, commensurate with ownership and to bear the risk of loss or failure and does not meet the test of ownership outlined in subpart 24 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Full-time equivalent employees.** "Full-time equivalent employees" are determined by dividing the total hours worked by all employees in the business during the preceding fiscal year by 2,088 hours.

Subp. 12. **Joint venture.** "Joint venture" means the association of two or more businesses, all of which businesses are certified as a targeted group and/or economically disadvantaged, for the purpose of receiving a procurement bid award.

Subp. 13. **Liquidated damages.** "Liquidated damages" means a specific sum of money, agreed to as part of a contract to be paid by one party to the other in the event of a breach of contract in lieu of actual damages, unless otherwise provided by law.

Subp. 14. **Manufacturer.** "Manufacturer" means a business that makes and/or processes raw materials into a finished product.

Subp. 15. **Manufacturer's representative.** "Manufacturer's representative" means a business that has a written agreement or agreements with one or more manufacturers or manufacturer's authorized distributors to sell the products of the manufacturer, but that is not an employee of the manufacturer.

Subp. 16. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions which allows a bidder a substantial advantage or benefit not enjoyed by all

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other bidders.

Subp. 17. **Person.** "Person" means a natural person or a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates.

Subp. 19. **Reinstatement.** "Reinstatement" means a debarred vendor may seek restoration to state bidders' lists one year from the date of debarment by submitting application to the commissioner through the Material Management Review Board. If restored, the vendor will be subject to a one year probationary period.

Subp. 20. **Responsible bidder.** "Responsible bidder" means a bidder who:

A. is not a broker of, but rather is a manufacturer of, regular dealer in, or the agent of a manufacturer with full knowledge of supplies to be furnished; or

B. if services are to be provided, has the necessary skills or is in the business of supplying these services; and

C. can demonstrate a satisfactory credit standing, lack of tax liability, and the financial capability to perform the contract as evidenced by the ability to obtain bonding when required; and

D. has no record of failure to perform or of unsatisfactory performance of contracts for the state or other customers and is not currently debarred by another government entity for any cause including defaults on contracts, late deliveries, products not meeting specifications, substandard installation, or service; and

E. is otherwise qualified under rule and law, including incorporation in or registration to do business in Minnesota; and

F. has not engaged in unlawful practices, associated with organized crime, operated under false names or fronts as small business or a socially or economically disadvantaged small business; and

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G. is in compliance with all tax laws of Minnesota; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G under part 1230.1500, subpart 20.

Subp. 21. **SIC or Standard Industrial Classification.** "SIC" or "Standard Industrial Classification" was developed for use in the classification of business establishments by type of activity, for the purpose of facilitating the collection, tabulation, presentation, and analysis of data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations, for promoting uniformity and comparability in the presentation of statistical data relating to those establishments and their fields of endeavor.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended from consideration for award of contracts by the director of Materials Management while the director determines if there is probable cause for debarment. The suspension shall not be for a period exceeding six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means those certified businesses designated by the commissioner of administration that are majority owned and operated by women, persons with disabilities, or specific minorities and provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially disadvantaged persons.** "Racial minority," "women," and "persons who have suffered a substantial physical disability" shall have the following meanings.

A. "Racial minority" means all persons in one or more of the following categories:

(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.

(2) "Hispanic" means all persons of Mexican,

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Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands. This area includes China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.

(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.

(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the governments of the United States and Canada.

B. "Women" means all persons of the female gender.

C. "Persons who have suffered a substantial physical disability" means all persons with a physical impairment that is likely to cause difficulty in securing, retaining, or advancing in employment, and that substantially limits one or more of his or her major life activities.

Subp. 25. **Third-party lessor.** "Third-party lessor" means a business that as a lessee acts as a lessor to a third party.

Subp. 26. **Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business.** "Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" means a small business entity with its principal place of business in Minnesota organized for profit, including any individual, partnership, corporation, joint venture, association, or cooperative, which entity is 51 percent owned and operated on a day-to-day basis by citizens of the United States of America.

1230.1600 ELIGIBILITY FOR SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Subpart 1. **Eligible businesses.** The following businesses

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are eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: manufacturer, manufacturer's representative, dealer, jobber, distributor, contractor, and businesses engaged in a joint venture.

Subp. 2. **Ineligible businesses.** The following businesses are not eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: brokers, third-party lessors, and franchises.

Subp. 3. **Revenue or sales limitations; Minnesota Small Business Program.** For the purpose of identifying businesses eligible to participate in the Minnesota Small Business Program, the preference and set-aside programs for targeted group small businesses; or for small businesses located in economically disadvantaged areas, the qualifying parameter shall be expressed in terms of gross annual revenues or sales as an upper limitation; i.e. "not to exceed." In no case shall the limitation for any category of business enterprise be set at less than $1,000,000.

A. Standard industrial classification (SIC) codes shall be used in classifying limitations among the variety of businesses potentially eligible for participation in the Minnesota Small Business Program.

B. Limitations, standards, shall be set for each major, two-digit, SIC group based on the following procedure:

(1) Typical financial balance sheet information compiled in annual reports such as the Robert Morris and Associates annual statement studies, Dun and Bradstreet, or similar reporting services will be used to establish the range of annual revenues or sales for a given major group class. This range shall, wherever the data is available, reflect an average of at least three consecutive reporting years, but shall not exceed five years.

(2) The upper limitation defining small business based on annual gross revenues or sales is determined by establishing a representative annual market consisting of the

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total gross revenues or sales generated by the reporting sample class. The lower quartile, 25 percent, of this market shall represent the small business category.

(3) The average gross revenues of the number of firms it requires to equal the total lower quartile market shall be the upper limit, defined in gross annual revenues or sales, permitted for definition of a small business in Minnesota.

(4) Where the three-digit SIC code data treated in subitems (1) to (3), varies significantly from the two-digit aggregated data or the four-digit data varies significantly from the two- or three-digit classes, a specific limitation shall be established for that three- or four-digit class.

(a) Significant variation for differences between two- and three-digit codes shall be five percent above or below the two-digit standard for gross annual revenue or sales.

(b) Significant variation for differences between three- and four-digit codes shall be five percent, or ten percent above or below the two-digit standard.

(5) After the initial establishment of limitations according to the process described for definition as a small business in Minnesota, for the purposes of this program, the Department of Administration shall in year two of the rule begin a process of reexamining on an annual basis one-third of the groups for appropriate limitations and redefinition where justified.

1230.1700 CERTIFICATION OF ELIGIBILITY.

Subpart 1. **Required information.** To qualify for the preference programs established by Minnesota Statutes, section 16B.19, subdivisions 2a to 2d, each business shall file with the Materials Management Division the following information on the application forms provided:

A. the name and address of the applicant and the principal place of business;

B. which type of designation as a small business,

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socially disadvantaged small business or economically disadvantaged area small business, is being applied for:

(1) socially disadvantaged small businesses are those businesses owned by socially disadvantaged persons as defined by Minnesota Department of Administration, part 1230.1550, subpart 24; or

(2) an individual business which is not a targeted group business but is owned by a socially disadvantaged person, as defined in part 1230.1550, subpart 24, that is encountering the effects of discrimination as evidenced by the owner lacking adequate external support necessary to operate a competitive business enterprise through a diminished ability to secure:

(a) long-term or working capital financing;

(b) equipment, raw material, or supplier trade credit;

(c) bonding and insurance; or

(d) a proportionate share of the market for its goods and services; or

(3) the small business is located in an economically disadvantaged area as defined in Minnesota Statutes, section 16B.19, subdivision 2d, and/or

(a) the owner resides or is employed in an area designated a labor surplus area by the United States Department of Labor;

(b) the owner resides or is employed in a county in which the median income for married couples is less than 70 percent of the state median income for married couples;

(c) the business is a rehabilitation facility or a work activity program as certified by the Department of Jobs and Training; or

(d) the small business owner resides or is employed in an area designated by the commissioner as an economically disadvantaged area under Minnesota Statutes, section 16B.19, subdivision 2d;

C. an indication of the type of business operated and

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the kinds of service, materials, or supplies which can be delivered;

D. a listing of all owners, including percentage of ownership, method of acquisition, ownership in other firms, and copies of the following documents:

(1) complete financial statements for the business for each of the preceding three fiscal years, or since the inception of the business if established less than three years;

(2) a profile of the owners' management responsibilities and a description of the management responsibilities assigned to other individuals, including a chronological resume for each owner, officer, and other key personnel;

(3) a statement indicating whether or not the business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises which are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) proof of ownership of business. Owners shall submit proof of their ownership of the requisite percentage of the business at the time the application is submitted, and the proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, a canceled check used to purchase ownership, or other recognized proof of ownership.

(a) In the case of a sole proprietorship or where documentary proof of ownership is not available, the owner shall clearly state the reasons for such and be prepared to assist the division in further investigation of proof.

(b) If requested, the owners must show how and when the interest in the business was acquired.

(c) The division may require additional

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proof or information necessary to verify ownership.

E. In addition, for certification under item B, subitem (2), unit (a), (b), (c), or (d), the following information must be provided for the most recent fiscal year and the preceding four years, if the applicant has operated as a business for four years, identifying the fiscal year reporting system used by the applicant and listing in whole dollar amounts:

(1) assets:

(a) cash and equivalent: all cash, marketplace securities, and other near-cash items, excluding sinking funds;

(b) trade receivables (net): all accounts from trade, less allowance for doubtful accounts;

(c) inventory: anything constituting inventory for the business;

(d) all other current: any other current assets, not including prepaid items;

(e) total current: the total of all current assets shown in subitems (a) to (d);

(f) fixed assets (net): all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;

(g) intangibles (net): intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;

(h) all other noncurrent: prepaid items and any other noncurrent assets;

(i) total: total of all items listed above.

(2) liabilities:

(a) notes payable (short-term debt): all short-term note obligations, including bank and commercial paper excluding trade notes payable;

(b) current maturities (long-term debt): that portion of long-term obligations that is due within the next fiscal year;

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(c) trade payables: open accounts due to the trade;

(d) income taxes payable: income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;

(e) all other current: all other current liabilities, including bank overdrafts and accrued expenses;

(f) total current: total of all current liabilities listed above;

(g) long-term debt: all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;

(h) deferred taxes: all deferred taxes. Identify federal, state, and local taxes in subtotals;

(i) all other noncurrent: any other noncurrent liabilities, including subordinated debt and liability reserves;

(j) net worth: difference between total liabilities and total assets, including minority interest;

(k) total liabilities and net worth: total of all items listed above.

(3) income data:

(a) net sales: gross sales less returns and discounts allowed, if any;

(b) gross profit: net sales less cost of sales;

(c) operating expenses: all selling, general, and administrative expenses, including depreciation, excluding interest expense;

(d) operating profit: gross profit less operating expenses;

(e) all other expenses (net): includes miscellaneous other income less expenses, such as interest expense, miscellaneous expenses not included in general and administrative expenses netted against recoveries, interest income, dividends received, and miscellaneous income;

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(f) profit before taxes: operating profit minus all other expenses (net).

F. If the business seeking certification is a contractor, the information in item E must be submitted in all categories except as modified in the following:

(1) assets:

(a) accounts receivable - progress billings: amounts billed on current contracts excluding retention;

(b) accounts receivable - current retention: amounts held back by customers on current contracts as retention;

(c) inventory: costs attributable to equipment, small tools, supplies, and other deferred costs related to contracts in progress where a portion of the cost applies to work not yet performed;

(d) costs and estimated earnings in excess of billings: the difference between the total of costs and recognized estimated earnings to date and the total billings to date;

(e) total current: total of all current assets shown and as modified, changed, or added in the above definitions;

(f) joint ventures and investments: the total of investments and equity in joint ventures.

(2) liabilities:

(a) accounts payable - trade: open accounts and not obligations due to the trade;

(b) accounts payable - retention: amounts held back as retention in payments to subcontractors on current contracts;

(c) billings in excess of costs and estimated earnings: the difference between the total billings to date and the total of costs and recognized estimated earnings to date;

(d) total current: total of all current

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liabilities shown and as modified, changed or added in the above definition;

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in the above definitions.

(3) income data:

(a) contract revenues: revenues recognized under percent of completion method (in place of net sales).

G. In separate schedules, all applicants applying under item E or F should show the amounts attributable to depreciation, depletion, amortization, interest income, interest expenses, officers' compensation, and miscellaneous income shown as passive or nonpassive income. A schedule of leased assets with a brief description of type and dollar value must be submitted. A brief outline describing shareholders equity must be submitted, when applicable, for the type of company organization.

In addition, supportive documentation must be submitted when seeking certification under various provisions as follows:

(1) item B, subitem (2), unit (a): for certification as lacking adequate external support in obtaining long-term or working capital financing, any documentation showing denial of loans or offers of loans at terms and rates not currently normal for similar enterprises;

(2) item B, subitem (2), unit (b): for certification as lacking external support in obtaining equipment, raw materials, or supplier trade credit, any documentation showing denial of credit or credit extended at terms, conditions, and rates in excess of the norm expected within similar enterprises;

(3) item B, subitem (2), unit (c): for certification as lacking adequate external support in obtaining bonding and insurance, any documentation showing inability to obtain bonding or insurance at rates and terms normally expected within the industry segment of the applicant.

(4) In all cases, adequacy of documentation,

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accuracy of financial data, and development of argument and positions with regard to an applicant's lack of external support within any of the four categories of item B, subitem (2), unit (a), (b), (c), or (d), rests with the applicant and must be submitted in writing with the application for certification. The division retains the right of inquiry and verification of all information submitted.

H. When seeking certification under any provision of item B, subitem (1), (2), or (3), or any other certification provision, the applicant shall provide all other relevant or supporting information requested by the division.

I. Denials of certification under these provisions are subject to appeal under subpart 7.

Subp. 2. and 3. [See Repealer.]

Subp. 4. **Notice of changes.** The director of the division shall be notified in writing of any change in the application or attached information within 30 days of the changes.

Subp. 5. **Grounds for rejecting application.** An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the application form and all supporting documents required by the division. An application shall be rejected on any of the following grounds:

A. the applicant is dominant in its field of operation or is an affiliate or subsidiary of a business dominant in its field of operation;

B. the applicant has failed to provide all relevant required information;

C. the applicant failed to establish that majority ownership and day-to-day operating control are held by socially disadvantaged small business or economically disadvantaged area small business person(s);

D. the applicant has failed to comply with laws and rules of the state relating to procurement;

E. the applicant has intentionally or negligently falsified application information;

F. the applicant is a broker and/or third-party

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lessor or operates as a franchiser or franchisee;

G. the applicant's principal place of business is not in Minnesota;

H. ownership of the applicant's business is shared with a previously certified participant who was removed from the bid eligibility list or directory of certified businesses by operation of Minnesota Statutes, section 16B.22, clause (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item I, subitem (2), unit (a), when applying as an individual business under subpart 1, item B, subitem (2).

Subp. 5a. **Criteria for determinations.** The following standards shall be used in determining whether, under subpart 5, item C, a firm is owned and operated on a day-to-day basis by one or more socially or economically disadvantaged persons:

A. The individual's claim, supported by sufficient documentation, that he or she is a socially disadvantaged small business person or an economically disadvantaged area small business person as defined in these rules.

B. The ownership and day-to-day operation of a socially disadvantaged small business or economically disadvantaged area small business must be real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents. The socially disadvantaged or economically disadvantaged small business owners must have the customary incidents of business ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than form of the business arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient. The division shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial arrangements, equipment rental or leasing agreements, and

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relationships with nontargeted businesses that vary from accepted industry practice.

C. The socially disadvantaged or economically disadvantaged area business owner must possess the power to direct the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operation. The firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially or economically disadvantaged owners. There must be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially or economically disadvantaged business owners from making a business decision for the firm without the cooperation or vote of any owner who is not a socially or economically disadvantaged person.

D. If the owners of the firm who are not socially or economically disadvantaged persons are disproportionately responsible for the operation of the firm, then the firm will not be considered to be owned and operated by socially or economically disadvantaged persons.

E. All securities that constitute ownership or control or both ownership and control of a corporation must be held directly by socially or economically disadvantaged persons. No securities held in trust or by any guardian for a minor will be considered as held by socially or economically disadvantaged persons in determining the ownership or control of a corporation.

F. The contributions of capital or expertise by the socially or economically disadvantaged owners to acquire their interests in the firm must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or participation as an employee only, rather than as a manager.

G. In addition to the standards in items A to F, the

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following circumstances will be given special consideration in determining eligibility:

(1) newly formed firms and firms whose ownership or day-to-day operating control or both ownership and control has changed will be closely scrutinized to determine the reasons for the timing of the formation or of a change in the firm;

(2) a previous or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities referred to in subpart 5 and this subpart;

(3) any relationship between a socially disadvantaged or economically disadvantaged area business and a business that is not a socially disadvantaged or economically disadvantaged area business that has an interest in the socially disadvantaged or economically disadvantaged area business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

H. The combined gross sales or revenues from businesses operated by the same owners in related fields exceed the highest size standard for the field defined under part 1230.1600, subpart 3.

I. The following standards, along with supporting documentation, shall be used in reaching a determination to certify an applicant under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d):

(1) Financial data for the company seeking certification shall be analyzed using formulas, techniques, processes, and ratios used in the annual statement studies published by Robert Morris and Associates (RMA), Philadelphia. Where RMA data does not reflect or provide adequate comparable data for the applicant's main line of business, the "Industry Norms and Key Business Ratios," published by Dun and Bradstreet Credit Services, or any similar representative reporting service may be used.

(2) Certification determination will be made upon

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careful review of all the evidence submitted. However, to establish eligibility for this review, the financial data applicable to the applicant company shall fall within the following parameters:

(a) financial ratios: at any point between the lower quartile and the upper quartile. Upper quartile ratings are indicative of a successful company not in need of the assistance provided through certification. Lower quartile ratings indicate a need for additional assistance before certification. Lower quartile businesses will be referred to the Department of Trade and Economic Development for remedial assistance before becoming eligible for reconsideration for certification.

(3) The following ratios and formulas will be used to determine eligibility for certification:

(a) lacking adequate external support in obtaining long-term or working capital financing: earnings before interest and taxes (EBIT)/interest, sales/working capital, quick ratio, fixed/worth, debt/worth;

(b) lacking adequate external support in obtaining equipment, raw materials, or supplier trade credit: current ratio, quick ratio;

(c) bonding and insurance: none - review of documentation only;

(d) the business has not captured a proportionate share of the market for its goods and services, based on the most current annual statement studies published by RMA. The national average revenues appropriate for the applicant business's standard industrial code and asset size will be divided by the national average assets determined similarly and multiplied by the applicant's actual total assets to indicate a proportionate market share. The applicant business's actual revenues will be divided by this proportionate market share to indicate the actual percentage of the proportionate market attained. Any percentage at 75 or less shall qualify for eligibility.

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(4) If eligible under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d), all other documentation shall be reviewed to arrive at a determination to grant or deny certification. The key determinant is "lacking adequate external support...as evidenced by diminished ability to secure..." Even though an applicant qualifies as an eligible business on the basis of financial ratios, if the business has been able to secure sufficient loans, bonding, insurance, or credit at the usual industry norms, it is not qualified as there is no evidence showing lack of support. Conversely, the business may show adequate financial ratios but still find itself unable to obtain any, or only partial, amounts of financing, bonding, credit, or insurance needed to remain competitive, or it can only acquire such at unfavorable terms not normal for its industry segment. Upon finding that such circumstances are not a result of internal management deficiencies as indicated by ratios appropriate to these concerns such as the following:

(a) percent profit before taxes/tangible net worth;

(b) percent profit before taxes/total assets;

(c) percent depreciation, depletion, amortization/sales; and

(d) percent officers' compensation/sales;

the business can be certified as a targeted group business. The same management efficiency review shall apply when determining certification due to an inability to capture a proportionate market share; however, no other documentation will need be considered under this eligibility criterion. Findings that a business suffers from internal management deficiencies will require a denial of certification until remedial assistance has been obtained through referral to the Department of Trade and Economic Development for help from public or private resources. When the appropriate ratio indicators fall within the eligible zone, the business may again apply for certification.

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The impact of both short- and long-term business cycles for the economy in general and for the particular business segment in specific shall be considered in arriving at certification findings. When appropriate, an average of two to five years of fiscal data for the applicant company shall be used in determining ratio values.

(5) Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines shall be reviewed for certification under those distinctions. If the company operates in more than one SIC classification, the review shall be made under the primary industry segment if 75 percent or more of its net sales or contract revenues are generated by that segment. The business may seek certification for individual product, service, commodity, or construction activities if 25 percent or more of its net sales or contract revenues is generated by a given category. All other financial data required by this application process must be proportionately attributed to the categories for which certification is sought unless it can be conclusively demonstrated that the dollar amounts shown are directly attributable to specific elements. If the company is unable to provide the breakdown of financial data requested by this rule, it must accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of rejection of application.** After an applicant has received written notice of rejection of the application for certification as a socially disadvantaged small business or economically disadvantaged area small business, the applicant may appeal the decision in writing to the commissioner of administration within 15 calendar days of receipt of the determination. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if ~~feasible~~ time permits, refer the appeal to the Small

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Business Procurement Advisory Council for its recommendation before reaching a final decision. The commissioner shall make a final decision in writing within 45 calendar days of receipt of the appeal.

1230.1800 PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A directory of eligible businesses, certified pursuant to part 1230.1700 shall be established and maintained by the division for various commodity classes.

1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES.

The division shall attempt to achieve utilization of socially disadvantaged small businesses in proportion to their representation in the market. In so doing, the division may use either of the following purchasing methods for awarding requisitions to those socially disadvantaged businesses designated by the commissioner as targeted group businesses.

A. When it is likely that three competitive bids will be obtained from certified targeted group small businesses, the requisition may be set aside for bidding only by those businesses.

(1) The division shall include a statement on the invitation to bid informing all vendors that the bid is set aside for bidding only by certified targeted group small businesses.

(2) The division shall reject any bid by a business not certified as a targeted group small business.

(3) Where there are no bids or no acceptable bids, unsatisfactory bids, if any, will be recorded and the requisition shall be rebid.

B. A certified targeted group small business may be awarded up to a six percent preference in the amount bid over the lowest responsible bid from another vendor.

(1) The division shall include a statement on the invitation to bid informing all vendors that certified targeted

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group vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

(2) When the lowest acceptable bid from a certified targeted group small business is within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified targeted group small business.

(3) When there is no acceptable bid from a certified targeted group small business within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING, OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction, consulting, or professional or technical services to targeted group small businesses.

A. Goals for subcontracting ~~may be independently set for each contract and may vary from contract to contract, depending on~~ will depend upon the type of work involved and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers from the normal subcontracting goals according to the following procedure:

A. The invitation to bid or request for proposals may

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as one of the conditions of contract waive subcontracting requirements for all or specific specialties based on the division's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

B. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof shall accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

C. After the award and the commencement of the project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Bid documents will state whether or not the incentive rule applies for the project being bid. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at $50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25 percent. Contracts between $2,000 and $50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500 in

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potential subcontracting awards.

(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or $60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

(a) subtract the established goal plus three percent from 25 percent;

(b) divide six percent of the project or $60,000, as appropriate, by the number of percentage points in unit (a); and

(c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed $60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the ~~Materials Management Review Board~~ director or the director's designee. The ~~board~~ director may uphold, modify, or reject the penalty. The decision of the ~~board~~ director may be appealed within 30

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calendar days to the commissioner. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, or, if feasible, may affirm or reject the ~~board's~~ director's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000, added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the underuse determined in the bid proposal as compared to the announced project goal.

D. The division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A certified economically disadvantaged small business may be awarded up to a four percent preference in the amount bid over the lowest responsible bid from another vendor.

A. The division shall include a statement on the invitation to bid informing all vendors that certified economically disadvantaged vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

B. When the lowest acceptable bid from a certified economically disadvantaged small business is within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified economically disadvantaged small business.

C. When there is no acceptable bid from a certified

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economically disadvantaged small business within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

D. When the division awards both a preference to a certified targeted group small business and a preference to a certified economically disadvantaged small business on the same requisition, the lowest acceptable bid shall be determined by deducting the preference percent awarded from the acceptable bid by the certified small business.

1230.1850 REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES.

Subpart 1. **Removal for failure to fulfill contract.** A business shall be removed from the bid eligibility lists and shall be ineligible to be awarded contracts when it fails to satisfactorily fulfill the terms and conditions of a contract. Removal or debarment by other governmental entities shall automatically result in removal from these bid eligibility lists as well. Notice of removal from bidding lists and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under this subpart may apply for reinstatement and participation in the preference program and may be listed if the division determines that the business is able to undertake and satisfactorily complete future contracts. As part of the reinstatement evaluation process, the division may require the applicant to provide in writing:

A. an explanation of the steps taken by the applicant to resolve the production, financial, or technical problems that caused its previous failure to perform; or

B. evidence of successful completion of at least four other contracts, including contracts with two public entities, in the same commodity class, field, or type of work in which the applicant seeks to bid or completion of the requirements for

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reinstatement and probation.

Subp. 3. **Removal from certified directory when a business no longer qualifies.** A business shall be removed from the certified directory and will no longer be eligible for bidding on any set-aside or preference contract when the business no longer qualifies for these preference program under Minnesota Statutes, section 16B.22, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business. When removal is for loss of status as an economically disadvantaged area, the business shall remain eligible for 120 days after certified small businesses in the area are notified of the termination of the status by the division.

Subp. 4. **Appeal of removal.** When a business is removed from the bid lists and disqualified from further bidding under subpart 1, 2, or 3 or is removed from the certified directory, the business may appeal the removal and disqualification to the commissioner of administration in writing within 15 calendar days of the receipt of the notice of removal. Receipt of the appeal shall be acknowledged by the commissioner in writing within 15 calendar days of receipt. The commissioner shall request that the business choose either an informal review of the disqualification under item A or a formal review under item B if facts of the matter are in dispute.

A. Under an informal review process, the Small Business Procurement Advisory Council shall consider whether the decision to remove a business from the bid list or certified directory was reasonable and whether the removal is in compliance with subpart 1 or 2. The council will review the facts presented by the business and the division. Within 45 calendar days of the council's receipt of a request for review, the council shall recommend that the commissioner take one of the following actions:

(1) reinstate the business on the bid lists or certified directory;

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(2) affirm the removal of the business; or

(3) refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62.

The council's recommendation to the commissioner shall be in writing and include the reasons for its decision. The commissioner shall consider the recommendation and make a final decision on the matter within 15 calendar days of receiving the council's recommendation. The commissioner shall include written reasons for the decision.

B. Within 30 calendar days after a request by the business or the council for formal review, the commissioner will initiate a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, by filing a request for assignment of an administrative law judge with a notice of an order for hearing. When the commissioner receives the report of the administrative law judge, the commissioner shall forward the report to the Small Business Procurement Advisory Council for its review, and the council shall, within 45 days, make its recommendation. The commissioner shall make a final decision on each appeal.

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

To ensure equitable distribution of awards and reduce the dependency of any given business on state awards for a major part of its annual revenues, the following limitations apply:

A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these program to that business exceed three-tenths of one percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute, the Department of Administration, the Department of Transportation, and the University of Minnesota.

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B. Eligibility for set-aside or preference for a specific business shall be terminated when the annual review of financial statements or the cumulative record of awards compiled by the division from reports submitted by agencies covered under the statute indicate that any of the following conditions exist:

(1) more than an average of 80 percent of the business's gross revenues or sales are attained through preference or set-aside awards during the second and third years of participation in the program;

(2) for years four and five, the limitation average shall be 50 percent of gross annual revenues or sales;

(3) for years six and beyond, the limit shall not exceed 40 percent.

There will be no limit on awards acquired through the normal competitive bid process at any time.

C. No business shall be permitted to participate in the preference and set-aside programs indefinitely. A business will not be certified but will graduate from the preference and set-aside programs when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

(2) demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area; or

(3) the business has captured a proportionate share in its market for assets employed, by the following averages:

(a) 200 percent in year one;

(b) 175 percent in years one and two;

(c) 150 percent in years one, two, and three;

(d) 125 percent in years two, three, and

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four;

(e) 125 percent in years three, four, and five, or any three consecutive years thereafter.

1230.1900 GENERAL TERMS AND CONDITIONS.

Subpart 1. **Inability to perform.** An eligible business that finds it cannot produce, supply, or construct according to the bid terms and conditions of a contract for reasons beyond its control shall immediately notify the division in writing of the reasons therefor. When the commissioner determines that the business is unable to perform for the reasons stated, the division shall notify the Department of Trade and Economic Development so that the commissioner of trade and economic development can assist the small business in attempting to remedy the causes of the inability to perform. The division shall notify the business of the referral to the Department of Trade and Economic Development and the notice shall include a statement that any records of the Department of Trade and Economic Development in assisting the small business may be discoverable in a contested case or judicial procedure. Failure to enter into a contract, to accept an offered award, or to satisfactorily complete a contract for documented reasons beyond its control will not automatically disqualify a business from further bidding.

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business's inability to perform. If the division decides that delay is inappropriate because of the nature of the bid or contract, the division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

B. Failure of the business in question to reasonably cooperate with either the division or the Department of Trade and Economic Development shall be considered a failure to

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fulfill the terms of a contract and shall be handled according to part 1230.1850, subpart 1. The records of the division shall document the actions taken relative to each case of inability to perform handled under this subpart.

Subp. 2. to 4. [See Repealer.]

Subp. 5. **Dividing bid invitations.** The director of the division shall divide bid invitations by dollar amounts, units of production, or duration of contract to facilitate awarding set-aside or preference contracts ~~wherever the division is considered~~ where economically feasible.

Subp. 6. [See Repealer.]

Subp. 7. **Annual reporting requirement.** The following reporting requirements apply to the socially disadvantaged or economically disadvantaged area small business programs:

A. Businesses eligible to participate in these programs shall, within 30 calendar days of a request by the division, verify information on file with the division for that business, make any necessary changes, and submit a complete financial statement to the division. The information on file with the division will include:

(1) the name and address of the applicant and its principal place of business;

(2) the applicant's gross revenues in the most recently completed fiscal year;

(3) whether the applicant's business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) a listing of all owners, including percentage of ownership, and all officers of the applicant, with full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises that are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) all other relevant or supporting information necessary for verifying status resulting in eligibility under

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certification procedures if requested in writing by the division, before or after the annual reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the certified directory.

1230.1910 CONSULTANT, PROFESSIONAL, AND TECHNICAL PROCUREMENTS.

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of consultant, professional, and technical procurements under Minnesota Statutes, section 16B.19, subdivision 2.

Subp. 2. **Awards.** Division certification is not required for individuals who provide consultant, professional, or technical services and who are not organized as a business, corporation, partnership, proprietorship, or other recognized business structure. An individual person may be awarded contracts under Minnesota Statutes, section 16B.19, subdivision 2, provided that the contracting agency maintains records stating that the individual meets the terms governing socially or economically disadvantaged area persons established in part 1230.1500, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.1700, subparts 2 and 3; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300 are repealed.

EFFECT OF EMERGENCY AMENDMENTS. After the emergency amendments expire as provided in Minnesota Statutes, section 14.35, the permanent rules as they read prior to those amendments shall again be in effect, except as they may be subsequently amended, and all rules that were repealed in these rules shall be revived.

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APPROVED AS TO FORM AND LEGALITY

October 17 19 90

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY Charlene M. Hatcher
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
OCT 12 1990

Joan Anderson Growe
Secretary of State

2:45 P.M.
M

Department of Administration

Adopted Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

Rules as Adopted

1230.0100 SCOPE.

Pursuant to Minnesota Statutes, chapter 16B, parts 1230.0100 to 1230.1910 govern the procurement of materials and services for the state under the competitive bidding requirements.

SMALL BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts 1230.1400 to 1230.1910 are adopted pursuant to Minnesota Statutes, sections 16B.19 to 16B.22 for the purpose of governing procurement procedures relating to the preference programs for targeted group or economically disadvantaged area small businesses. These programs are administered by the Materials Management Division, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

1230.1500 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and parts 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern.

1230.1550 DEFINITIONS.

Subpart 1. **Scope.** The definitions contained in part 1230.0200 shall apply in the administration of these preference programs. The definitions in subparts 2 to 25 shall also apply.

Subp. 2. **Affiliate or subsidiary of a business dominant in its field of operation.**

A. "Affiliate or subsidiary of a business dominant in its field of operation" means a business that is at least 20

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percent owned by a business dominant in its field of operation or by partners, officers, directors, majority stockholders, or their equivalent of a business dominant in that field of operation.

B. "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in part 1230.1600, subpart 3.

Subp. 3. **Broker.** "Broker" means a business that carries no inventory and that has no written ongoing agreement with any manufacturer or manufacturer's authorized distributor to sell the products of the manufacturer.

Subp. 4. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 5. **Contractor.** "Contractor" means a business that is engaged in construction such as general, mechanical, and/or electrical contracting, or that provides a specific service such as trash removal, snow removal, janitorial services, or consultant, professional, or technical services.

Subp. 6. **Dealer, jobber, or distributor.** "Dealer," "jobber," or "distributor" means a business that maintains a store, warehouse, or other establishment in which a line or lines of products are kept in inventory and are sold to the public on a wholesale and/or retail basis.

Subp. 7. **Debarment.** "Debarment" means the disqualification of a person to receive invitations for bids or requests for proposals, or the award of any contract by any governmental body, for a specified period of time commensurate with the seriousness of the offense, the failure, or the inadequacy of performance.

Subp. 8. **Director.** "Director" means director of the Materials Management Division or a materials management division manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Material Management

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Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means any operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, which does not provide the operator with the exclusive right to profit from his or her effort, commensurate with ownership and to bear the risk of loss or failure and does not meet the test of ownership outlined in subpart 24 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Full-time equivalent employees.** "Full-time equivalent employees" are determined by dividing the total hours worked by all employees in the business during the preceding fiscal year by 2,088 hours.

Subp. 12. **Joint venture.** "Joint venture" means the association of two or more businesses, all of which businesses are certified as a targeted group and/or economically disadvantaged, for the purpose of receiving a procurement bid award.

Subp. 13. **Liquidated damages.** "Liquidated damages" means a specific sum of money, agreed to as part of a contract to be paid by one party to the other in the event of a breach of contract in lieu of actual damages, unless otherwise provided by law.

Subp. 14. **Manufacturer.** "Manufacturer" means a business that makes and/or processes raw materials into a finished product.

Subp. 15. **Manufacturer's representative.** "Manufacturer's representative" means a business that has a written agreement or agreements with one or more manufacturers or manufacturer's authorized distributors to sell the products of the manufacturer, but that is not an employee of the manufacturer.

Subp. 16. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions which allows a bidder a substantial advantage or benefit not enjoyed by all

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other bidders.

Subp. 17. **Person.** "Person" means a natural person or a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates.

Subp. 19. **Reinstatement.** "Reinstatement" means a debarred vendor may seek restoration to state bidders' lists one year from the date of debarment by submitting application to the commissioner through the Material Management Review Board. If restored, the vendor will be subject to a one year probationary period.

Subp. 20. **Responsible bidder.** "Responsible bidder" means a bidder who:

A. is not a broker of, but rather is a manufacturer of, regular dealer in, or the agent of a manufacturer with full knowledge of supplies to be furnished; or

B. if services are to be provided, has the necessary skills or is in the business of supplying these services; and

C. can demonstrate a satisfactory credit standing, lack of tax liability, and the financial capability to perform the contract as evidenced by the ability to obtain bonding when required; and

D. has no record of failure to perform or of unsatisfactory performance of contracts for the state or other customers and is not currently debarred by another government entity for any cause including defaults on contracts, late deliveries, products not meeting specifications, substandard installation, or service; and

E. is otherwise qualified under rule and law, including incorporation in or registration to do business in Minnesota; and

F. has not engaged in unlawful practices, associated with organized crime, operated under false names or fronts as small business or a socially or economically disadvantaged small business; and

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G. is in compliance with all tax laws of Minnesota; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G under part 1230.1500, subpart 20.

Subp. 21. **SIC or Standard Industrial Classification.** "SIC" or "Standard Industrial Classification" was developed for use in the classification of business establishments by type of activity, for the purpose of facilitating the collection, tabulation, presentation, and analysis of data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations, for promoting uniformity and comparability in the presentation of statistical data relating to those establishments and their fields of endeavor.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended from consideration for award of contracts by the director of Materials Management while the director determines if there is probable cause for debarment. The suspension shall not be for a period exceeding six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means those certified businesses designated by the commissioner of administration that are majority owned and operated by women, persons with disabilities, or specific minorities and provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially disadvantaged persons.** "Racial minority," "women," and "persons who have suffered a substantial physical disability" shall have the following meanings.

A. "Racial minority" means all persons in one or more of the following categories:

(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.

(2) "Hispanic" means all persons of Mexican,

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Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands. This area includes China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.

(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.

(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the governments of the United States and Canada.

B. "Women" means all persons of the female gender.

C. "Persons who have suffered a substantial physical disability" means all persons with a physical impairment that is likely to cause difficulty in securing, retaining, or advancing in employment, and that substantially limits one or more of his or her major life activities.

Subp. 25. **Third-party lessor.** "Third-party lessor" means a business that as a lessee acts as a lessor to a third party.

Subp. 26. **Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business.** "Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" means a small business entity with its principal place of business in Minnesota organized for profit, including any individual, partnership, corporation, joint venture, association, or cooperative, which entity is 51 percent owned and operated on a day-to-day basis by citizens of the United States of America.

1230.1600 ELIGIBILITY FOR SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Subpart 1. **Eligible businesses.** The following businesses

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are eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: manufacturer, manufacturer's representative, dealer, jobber, distributor, contractor, and businesses engaged in a joint venture.

Subp. 2. **Ineligible businesses.** The following businesses are not eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: brokers, third-party lessors, and franchises.

Subp. 3. **Revenue or sales limitations; Minnesota Small Business Program.** For the purpose of identifying businesses eligible to participate in the Minnesota Small Business Program, the preference and set-aside programs for targeted group small businesses; or for small businesses located in economically disadvantaged areas, the qualifying parameter shall be expressed in terms of gross annual revenues or sales as an upper limitation; i.e. "not to exceed." In no case shall the limitation for any category of business enterprise be set at less than $1,000,000.

A. Standard industrial classification (SIC) codes shall be used in classifying limitations among the variety of businesses potentially eligible for participation in the Minnesota Small Business Program.

B. Limitations, standards, shall be set for each major, two-digit, SIC group based on the following procedure:

(1) Typical financial balance sheet information compiled in annual reports such as the Robert Morris and Associates annual statement studies, Dun and Bradstreet, or similar reporting services will be used to establish the range of annual revenues or sales for a given major group class. This range shall, wherever the data is available, reflect an average of at least three consecutive reporting years, but shall not exceed five years.

(2) The upper limitation defining small business based on annual gross revenues or sales is determined by establishing a representative annual market consisting of the

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total gross revenues or sales generated by the reporting sample class. The lower quartile, 25 percent, of this market shall represent the small business category.

(3) The average gross revenues of the number of firms it requires to equal the total lower quartile market shall be the upper limit, defined in gross annual revenues or sales, permitted for definition of a small business in Minnesota.

(4) Where the three-digit SIC code data treated in subitems (1) to (3), varies significantly from the two-digit aggregated data or the four-digit data varies significantly from the two- or three-digit classes, a specific limitation shall be established for that three- or four-digit class.

(a) Significant variation for differences between two- and three-digit codes shall be five percent above or below the two-digit standard for gross annual revenue or sales.

(b) Significant variation for differences between three- and four-digit codes shall be five percent, or ten percent above or below the two-digit standard.

(5) After the initial establishment of limitations according to the process described for definition as a small business in Minnesota, for the purposes of this program, the Department of Administration shall in year two of the rule begin a process of reexamining on an annual basis one-third of the groups for appropriate limitations and redefinition where justified.

1230.1700 CERTIFICATION OF ELIGIBILITY.

Subpart 1. **Required information.** To qualify for the preference programs established by Minnesota Statutes, section 16B.19, subdivisions 2a to 2d, each business shall file with the Materials Management Division the following information on the application forms provided:

A. the name and address of the applicant and the principal place of business;

B. which type of designation as a small business,

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socially disadvantaged small business or economically disadvantaged area small business, is being applied for:

(1) socially disadvantaged small businesses are those businesses defined by Minnesota Department of Administration, part 1230.1550, subpart 24; or

(2) an individual business which is not a targeted group business but is owned by a socially disadvantaged person, as defined in part 1230.1550, subpart 24, that is encountering the effects of discrimination as evidenced by the owner lacking adequate external support necessary to operate a competitive business enterprise through a diminished ability to secure:

(a) long-term or working capital financing;

(b) equipment, raw material, or supplier trade credit;

(c) bonding and insurance; or

(d) a proportionate share of the market for its goods and services; or

(3) the small business is located in an economically disadvantaged area as defined in Minnesota Statutes, section 16B.19, subdivision 2d, and/or

(a) the owner resides or is employed in an area designated a labor surplus area by the United States Department of Labor;

(b) the owner resides or is employed in a county in which the median income for married couples is less than 70 percent of the state median income for married couples;

(c) the business is a rehabilitation facility or a work activity program as certified by the Department of Jobs and Training; or

(d) the small business owner resides or is employed in an area designated by the commissioner as an economically disadvantaged area under Minnesota Statutes, section 16B.19, subdivision 2d;

C. an indication of the type of business operated and the kinds of service, materials, or supplies which can be

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delivered;

D. a listing of all owners, including percentage of ownership, method of acquisition, ownership in other firms, and copies of the following documents:

(1) complete financial statements for the business for each of the preceding three fiscal years, or since the inception of the business if established less than three years;

(2) a profile of the owners' management responsibilities and a description of the management responsibilities assigned to other individuals, including a chronological resume for each owner, officer, and other key personnel;

(3) a statement indicating whether or not the business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises which are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) proof of ownership of business. Owners shall submit proof of their ownership of the requisite percentage of the business at the time the application is submitted, and the proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, a canceled check used to purchase ownership, or other recognized proof of ownership.

(a) In the case of a sole proprietorship or where documentary proof of ownership is not available, the owner shall clearly state the reasons for such and be prepared to assist the division in further investigation of proof.

(b) If requested, the owners must show how and when the interest in the business was acquired.

(c) The division may require additional proof or information necessary to verify ownership.

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E. In addition, for certification under item B, subitem (2), unit (a), (b), (c), or (d), the following information must be provided for the most recent fiscal year and the preceding four years, if the applicant has operated as a business for four years, identifying the fiscal year reporting system used by the applicant and listing in whole dollar amounts:

(1) assets:

(a) cash and equivalent: all cash, marketplace securities, and other near-cash items, excluding sinking funds;

(b) trade receivables (net): all accounts from trade, less allowance for doubtful accounts;

(c) inventory: anything constituting inventory for the business;

(d) all other current: any other current assets, not including prepaid items;

(e) total current: the total of all current assets shown in subitems (a) to (d);

(f) fixed assets (net): all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;

(g) intangibles (net): intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;

(h) all other noncurrent: prepaid items and any other noncurrent assets;

(i) total: total of all items listed above.

(2) liabilities:

(a) notes payable (short-term debt): all short-term note obligations, including bank and commercial paper excluding trade notes payable;

(b) current maturities (long-term debt): that portion of long-term obligations that is due within the next fiscal year;

(c) trade payables: open accounts due to

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the trade;

(d) income taxes payable: income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;

(e) all other current: all other current liabilities, including bank overdrafts and accrued expenses;

(f) total current: total of all current liabilities listed above;

(g) long-term debt: all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;

(h) deferred taxes: all deferred taxes. Identify federal, state, and local taxes in subtotals;

(i) all other noncurrent: any other noncurrent liabilities, including subordinated debt and liability reserves;

(j) net worth: difference between total liabilities and total assets, including minority interest;

(k) total liabilities and net worth: total of all items listed above.

(3) income data:

(a) net sales: gross sales less returns and discounts allowed, if any;

(b) gross profit: net sales less cost of sales;

(c) operating expenses: all selling, general, and administrative expenses, including depreciation, excluding interest expense;

(d) operating profit: gross profit less operating expenses;

(e) all other expenses (net): includes miscellaneous other income less expenses, such as interest expense, miscellaneous expenses not included in general and administrative expenses netted against recoveries, interest income, dividends received, and miscellaneous income;

(f) profit before taxes: operating profit

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minus all other expenses (net).

F. If the business seeking certification is a contractor, the information in item E must be submitted in all categories except as modified in the following:

(1) assets:

(a) accounts receivable - progress billings: amounts billed on current contracts excluding retention;

(b) accounts receivable - current retention: amounts held back by customers on current contracts as retention;

(c) inventory: costs attributable to equipment, small tools, supplies, and other deferred costs related to contracts in progress where a portion of the cost applies to work not yet performed;

(d) costs and estimated earnings in excess of billings: the difference between the total of costs and recognized estimated earnings to date and the total billings to date;

(e) total current: total of all current assets shown and as modified, changed, or added in the above definitions;

(f) joint ventures and investments: the total of investments and equity in joint ventures.

(2) liabilities:

(a) accounts payable - trade: open accounts and not obligations due to the trade;

(b) accounts payable - retention: amounts held back as retention in payments to subcontractors on current contracts;

(c) billings in excess of costs and estimated earnings: the difference between the total billings to date and the total of costs and recognized estimated earnings to date;

(d) total current: total of all current liabilities shown and as modified, changed or added in the above

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definition;

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in the above definitions.

(3) income data:

(a) contract revenues: revenues recognized under percent of completion method (in place of net sales).

G. In separate schedules, all applicants applying under item E or F should show the amounts attributable to depreciation, depletion, amortization, interest income, interest expenses, officers' compensation, and miscellaneous income shown as passive or nonpassive income. A schedule of leased assets with a brief description of type and dollar value must be submitted. A brief outline describing shareholders equity must be submitted, when applicable, for the type of company organization.

In addition, supportive documentation must be submitted when seeking certification under various provisions as follows:

(1) item B, subitem (2), unit (a): for certification as lacking adequate external support in obtaining long-term or working capital financing, any documentation showing denial of loans or offers of loans at terms and rates not currently normal for similar enterprises;

(2) item B, subitem (2), unit (b): for certification as lacking external support in obtaining equipment, raw materials, or supplier trade credit, any documentation showing denial of credit or credit extended at terms, conditions, and rates in excess of the norm expected within similar enterprises;

(3) item B, subitem (2), unit (c): for certification as lacking adequate external support in obtaining bonding and insurance, any documentation showing inability to obtain bonding or insurance at rates and terms normally expected within the industry segment of the applicant.

(4) In all cases, adequacy of documentation, accuracy of financial data, and development of argument and

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positions with regard to an applicant's lack of external support within any of the four categories of item B, subitem (2), unit (a), (b), (c), or (d), rests with the applicant and must be submitted in writing with the application for certification. The division retains the right of inquiry and verification of all information submitted.

H. When seeking certification under any provision of item B, subitem (1), (2), or (3), or any other certification provision, the applicant shall provide all other relevant or supporting information requested by the division.

I. Denials of certification under these provisions are subject to appeal under subpart 7.

Subp. 2. and 3. [See Repealer.]

Subp. 4. **Notice of changes.** The director of the division shall be notified in writing of any change in the application or attached information within 30 days of the changes.

Subp. 5. **Grounds for rejecting application.** An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the application form and all supporting documents required by the division. An application shall be rejected on any of the following grounds:

A. the applicant is dominant in its field of operation or is an affiliate or subsidiary of a business dominant in its field of operation;

B. the applicant has failed to provide all relevant required information;

C. the applicant failed to establish that majority ownership and day-to-day operating control are held by socially disadvantaged small business or economically disadvantaged area small business person(s);

D. the applicant has failed to comply with laws and rules of the state relating to procurement;

E. the applicant has intentionally or negligently falsified application information;

F. the applicant is a broker and/or third-party lessor or operates as a franchiser or franchisee;

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G. the applicant's principal place of business is not in Minnesota;

H. ownership of the applicant's business is shared with a previously certified participant who was removed from the bid eligibility list or directory of certified businesses by operation of Minnesota Statutes, section 16B.22, clause (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item I, subitem (2), unit (a), when applying as an individual business under subpart 1, item B, subitem (2).

Subp. 5a. **Criteria for determinations.** The following standards shall be used in determining whether, under subpart 5, item C, a firm is owned and operated on a day-to-day basis by one or more socially or economically disadvantaged persons:

A. The individual's claim, supported by sufficient documentation, that he or she is a socially disadvantaged small business person or an economically disadvantaged area small business person as defined in these rules.

B. The ownership and day-to-day operation of a socially disadvantaged small business or economically disadvantaged area small business must be real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents. The socially disadvantaged or economically disadvantaged small business owners must have the customary incidents of business ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than form of the business arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient. The division shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial arrangements, equipment rental or leasing agreements, and relationships with nontargeted businesses that vary from

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accepted industry practice.

C. The socially disadvantaged or economically disadvantaged area business owner must possess the power to direct the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operation. The firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially or economically disadvantaged owners. There must be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially or economically disadvantaged business owners from making a business decision for the firm without the cooperation or vote of any owner who is not a socially or economically disadvantaged person.

D. If the owners of the firm who are not socially or economically disadvantaged persons are disproportionately responsible for the operation of the firm, then the firm will not be considered to be owned and operated by socially or economically disadvantaged persons.

E. All securities that constitute ownership or control or both ownership and control of a corporation must be held directly by socially or economically disadvantaged persons. No securities held in trust or by any guardian for a minor will be considered as held by socially or economically disadvantaged persons in determining the ownership or control of a corporation.

F. The contributions of capital or expertise by the socially or economically disadvantaged owners to acquire their interests in the firm must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or participation as an employee only, rather than as a manager.

G. In addition to the standards in items A to F, the following circumstances will be given special consideration in

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determining eligibility:

(1) newly formed firms and firms whose ownership or day-to-day operating control or both ownership and control has changed will be closely scrutinized to determine the reasons for the timing of the formation or of a change in the firm;

(2) a previous or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities referred to in subpart 5 and this subpart;

(3) any relationship between a socially disadvantaged or economically disadvantaged area business and a business that is not a socially disadvantaged or economically disadvantaged area business that has an interest in the socially disadvantaged or economically disadvantaged area business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

H. The combined gross sales or revenues from businesses operated by the same owners in related fields exceed the highest size standard for the field defined under part 1230.1600, subpart 3.

I. The following standards, along with supporting documentation, shall be used in reaching a determination to certify an applicant under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d):

(1) Financial data for the company seeking certification shall be analyzed using formulas, techniques, processes, and ratios used in the annual statement studies published by Robert Morris and Associates (RMA), Philadelphia. Where RMA data does not reflect or provide adequate comparable data for the applicant's main line of business, the "Industry Norms and Key Business Ratios," published by Dun and Bradstreet Credit Services, or any similar representative reporting service may be used.

(2) Certification determination will be made upon careful review of all the evidence submitted. However, to

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establish eligibility for this review, the financial data applicable to the applicant company shall fall within the following parameters:

(a) financial ratios: at any point between the lower quartile and the upper quartile. Upper quartile ratings are indicative of a successful company not in need of the assistance provided through certification. Lower quartile ratings indicate a need for additional assistance before certification. Lower quartile businesses will be referred to the Department of Trade and Economic Development for remedial assistance before becoming eligible for reconsideration for certification.

(3) The following ratios and formulas will be used to determine eligibility for certification:

(a) lacking adequate external support in obtaining long-term or working capital financing: earnings before interest and taxes (EBIT)/interest, sales/working capital, quick ratio, fixed/worth, debt/worth;

(b) lacking adequate external support in obtaining equipment, raw materials, or supplier trade credit: current ratio, quick ratio;

(c) bonding and insurance: none - review of documentation only;

(d) the business has not captured a proportionate share of the market for its goods and services, based on the most current annual statement studies published by RMA. The national average revenues appropriate for the applicant business's standard industrial code and asset size will be divided by the national average assets determined similarly and multiplied by the applicant's actual total assets to indicate a proportionate market share. The applicant business's actual revenues will be divided by this proportionate market share to indicate the actual percentage of the proportionate market attained. Any percentage at 75 or less shall qualify for eligibility.

(4) If eligible under subpart 1, item B, subitem

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(2), unit (a), (b), (c), or (d), all other documentation shall be reviewed to arrive at a determination to grant or deny certification. The key determinant is "lacking adequate external support...as evidenced by diminished ability to secure..." Even though an applicant qualifies as an eligible business on the basis of financial ratios, if the business has been able to secure sufficient loans, bonding, insurance, or credit at the usual industry norms, it is not qualified as there is no evidence showing lack of support. Conversely, the business may show adequate financial ratios but still find itself unable to obtain any, or only partial, amounts of financing, bonding, credit, or insurance needed to remain competitive, or it can only acquire such at unfavorable terms not normal for its industry segment. Upon finding that such circumstances are not a result of internal management deficiencies as indicated by ratios appropriate to these concerns such as the following:

(a) percent profit before taxes/tangible net worth;

(b) percent profit before taxes/total assets;

(c) percent depreciation, depletion, amortization/sales; and

(d) percent officers' compensation/sales;

the business can be certified as a targeted group business. The same management efficiency review shall apply when determining certification due to an inability to capture a proportionate market share; however, no other documentation will need be considered under this eligibility criterion. Findings that a business suffers from internal management deficiencies will require a denial of certification until remedial assistance has been obtained through referral to the Department of Trade and Economic Development for help from public or private resources. When the appropriate ratio indicators fall within the eligible zone, the business may again apply for certification.

The impact of both short- and long-term business cycles for

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the economy in general and for the particular business segment in specific shall be considered in arriving at certification findings. When appropriate, an average of two to five years of fiscal data for the applicant company shall be used in determining ratio values.

(5) Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines shall be reviewed for certification under those distinctions. If the company operates in more than one SIC classification, the review shall be made under the primary industry segment if 75 percent or more of its net sales or contract revenues are generated by that segment. The business may seek certification for individual product, service, commodity, or construction activities if 25 percent or more of its net sales or contract revenues is generated by a given category. All other financial data required by this application process must be proportionately attributed to the categories for which certification is sought unless it can be conclusively demonstrated that the dollar amounts shown are directly attributable to specific elements. If the company is unable to provide the breakdown of financial data requested by this rule, it must accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of rejection of application.** After an applicant has received written notice of rejection of the application for certification as a socially disadvantaged small business or economically disadvantaged area small business, the applicant may appeal the decision in writing to the commissioner of administration within 15 calendar days of receipt of the determination. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if ~~feasible~~ time permits, refer the appeal to the Small Business Procurement Advisory Council for its recommendation

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before reaching a final decision. The commissioner shall make a final decision in writing within 45 calendar days of receipt of the appeal.

1230.1800 PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A directory of eligible businesses, certified pursuant to part 1230.1700 shall be established and maintained by the division for various commodity classes.

1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES.

The division shall attempt to achieve utilization of socially disadvantaged small businesses in proportion to their representation in the market. In so doing, the division may use either of the following purchasing methods for awarding requisitions to those socially disadvantaged businesses designated by the commissioner as targeted group businesses.

A. When it is likely that three competitive bids will be obtained from certified targeted group small businesses, the requisition may be set aside for bidding only by those businesses.

(1) The division shall include a statement on the invitation to bid informing all vendors that the bid is set aside for bidding only by certified targeted group small businesses.

(2) The division shall reject any bid by a business not certified as a targeted group small business.

(3) Where there are no bids or no acceptable bids, unsatisfactory bids, if any, will be recorded and the requisition shall be rebid.

B. A certified targeted group small business may be awarded up to a six percent preference in the amount bid over the lowest responsible bid from another vendor.

(1) The division shall include a statement on the invitation to bid informing all vendors that certified targeted group vendors will receive a preference in the amount bid and

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the amount of the preference to be awarded.

(2) When the lowest acceptable bid from a certified targeted group small business is within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified targeted group small business.

(3) When there is no acceptable bid from a certified targeted group small business within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING, OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction, consulting, or professional or technical services to targeted group small businesses.

A. Goals for subcontracting ~~may be independently set for each contract and may vary from contract to contract, depending on~~ will depend upon the type of work involved and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers from the normal subcontracting goals according to the following procedure:

A. The invitation to bid or request for proposals may as one of the conditions of contract waive subcontracting

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requirements for all or specific specialties based on the division's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

B. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof shall accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

C. After the award and the commencement of the project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Bid documents will state whether or not the incentive rule applies for the project being bid. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at $50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25 percent. Contracts between $2,000 and $50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500 in potential subcontracting awards.

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(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or $60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

(a) subtract the established goal plus three percent from 25 percent;

(b) divide six percent of the project or $60,000, as appropriate, by the number of percentage points in unit (a); and

(c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed $60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the ~~Materials Management Review Board~~ director or the director's designee. The ~~board~~ director may uphold, modify, or reject the penalty. The decision of the ~~board~~ director may be appealed within 30 calendar days to the commissioner. If there are facts in

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dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, or, if feasible, may affirm or reject the ~~board's~~ director's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000, added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the underuse determined in the bid proposal as compared to the announced project goal.

D. The division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A certified economically disadvantaged small business may be awarded up to a four percent preference in the amount bid over the lowest responsible bid from another vendor.

A. The division shall include a statement on the invitation to bid informing all vendors that certified economically disadvantaged vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

B. When the lowest acceptable bid from a certified economically disadvantaged small business is within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified economically disadvantaged small business.

C. When there is no acceptable bid from a certified economically disadvantaged small business within four percent of

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the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

D. When the division awards both a preference to a certified targeted group small business and a preference to a certified economically disadvantaged small business on the same requisition, the lowest acceptable bid shall be determined by deducting the preference percent awarded from the acceptable bid by the certified small business.

1230.1850 REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES.

Subpart 1. **Removal for failure to fulfill contract.** A business shall be removed from the bid eligibility lists and shall be ineligible to be awarded contracts when it fails to satisfactorily fulfill the terms and conditions of a contract. Removal or debarment by other governmental entities shall automatically result in removal from these bid eligibility lists as well. Notice of removal from bidding lists and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under this subpart may apply for reinstatement and participation in the preference program and may be listed if the division determines that the business is able to undertake and satisfactorily complete future contracts. As part of the reinstatement evaluation process, the division may require the applicant to provide in writing:

A. an explanation of the steps taken by the applicant to resolve the production, financial, or technical problems that caused its previous failure to perform; or

B. evidence of successful completion of at least four other contracts, including contracts with two public entities, in the same commodity class, field, or type of work in which the applicant seeks to bid or completion of the requirements for reinstatement and probation.

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Subp. 3. **Removal from certified directory when a business no longer qualifies.** A business shall be removed from the certified directory and will no longer be eligible for bidding on any set-aside or preference contract when the business no longer qualifies for these preference program under Minnesota Statutes, section 16B.22, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business. When removal is for loss of status as an economically disadvantaged area, the business shall remain eligible for 120 days after certified small businesses in the area are notified of the termination of the status by the division.

Subp. 4. **Appeal of removal.** When a business is removed from the bid lists and disqualified from further bidding under subpart 1, 2, or 3 or is removed from the certified directory, the business may appeal the removal and disqualification to the commissioner of administration in writing within 15 calendar days of the receipt of the notice of removal. Receipt of the appeal shall be acknowledged by the commissioner in writing within 15 calendar days of receipt. The commissioner shall request that the business choose either an informal review of the disqualification under item A or a formal review under item B if facts of the matter are in dispute.

A. Under an informal review process, the Small Business Procurement Advisory Council shall consider whether the decision to remove a business from the bid list or certified directory was reasonable and whether the removal is in compliance with subpart 1 or 2. The council will review the facts presented by the business and the division. Within 45 calendar days of the council's receipt of a request for review, the council shall recommend that the commissioner take one of the following actions:

(1) reinstate the business on the bid lists or certified directory;

(2) affirm the removal of the business; or

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(3) refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62.

The council's recommendation to the commissioner shall be in writing and include the reasons for its decision. The commissioner shall consider the recommendation and make a final decision on the matter within 15 calendar days of receiving the council's recommendation. The commissioner shall include written reasons for the decision.

B. Within 30 calendar days after a request by the business or the council for formal review, the commissioner will initiate a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, by filing a request for assignment of an administrative law judge with a notice of an order for hearing. When the commissioner receives the report of the administrative law judge, the commissioner shall forward the report to the Small Business Procurement Advisory Council for its review, and the council shall, within 45 days, make its recommendation. The commissioner shall make a final decision on each appeal.

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

To ensure equitable distribution of awards and reduce the dependency of any given business on state awards for a major part of its annual revenues, the following limitations apply:

A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these program to that business exceed three-tenths of one percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute, the Department of Administration, the Department of Transportation, and the University of Minnesota.

B. Eligibility for set-aside or preference for a

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specific business shall be terminated when the annual review of financial statements or the cumulative record of awards compiled by the division from reports submitted by agencies covered under the statute indicate that any of the following conditions exist:

(1) more than an average of 80 percent of the business's gross revenues or sales are attained through preference or set-aside awards during the second and third years of participation in the program;

(2) for years four and five, the limitation average shall be 50 percent of gross annual revenues or sales;

(3) for years six and beyond, the limit shall not exceed 40 percent.

There will be no limit on awards acquired through the normal competitive bid process at any time.

C. No business shall be permitted to participate in the preference and set-aside programs indefinitely. A business will not be certified but will graduate from the preference and set-aside programs when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

(2) demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area; or

(3) the business has captured a proportionate share in its market for assets employed, by the following averages:

(a) 200 percent in year one;

(b) 175 percent in years one and two;

(c) 150 percent in years one, two, and three;

(d) 125 percent in years two, three, and four;

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(e) 125 percent in years three, four, and five, or any three consecutive years thereafter.

1230.1900 GENERAL TERMS AND CONDITIONS.

Subpart 1. **Inability to perform.** An eligible business that finds it cannot produce, supply, or construct according to the bid terms and conditions of a contract for reasons beyond its control shall immediately notify the division in writing of the reasons therefor. When the commissioner determines that the business is unable to perform for the reasons stated, the division shall notify the Department of Trade and Economic Development so that the commissioner of trade and economic development can assist the small business in attempting to remedy the causes of the inability to perform. The division shall notify the business of the referral to the Department of Trade and Economic Development and the notice shall include a statement that any records of the Department of Trade and Economic Development in assisting the small business may be discoverable in a contested case or judicial procedure. Failure to enter into a contract, to accept an offered award, or to satisfactorily complete a contract for documented reasons beyond its control will not automatically disqualify a business from further bidding.

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business's inability to perform. If the division decides that delay is inappropriate because of the nature of the bid or contract, the division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

B. Failure of the business in question to reasonably cooperate with either the division or the Department of Trade and Economic Development shall be considered a failure to fulfill the terms of a contract and shall be handled according

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to part 1230.1850, subpart 1. The records of the division shall document the actions taken relative to each case of inability to perform handled under this subpart.

Subp. 2. to 4. [See Repealer.]

Subp. 5. **Dividing bid invitations.** The director of the division shall divide bid invitations by dollar amounts, units of production, or duration of contract to facilitate awarding set-aside or preference contracts ~~wherever the division is considered~~ where economically feasible.

Subp. 6. [See Repealer.]

Subp. 7. **Annual reporting requirement.** The following reporting requirements apply to the socially disadvantaged or economically disadvantaged area small business programs:

A. Businesses eligible to participate in these programs shall, within 30 calendar days of a request by the division, verify information on file with the division for that business, make any necessary changes, and submit a complete financial statement to the division. The information on file with the division will include:

(1) the name and address of the applicant and its principal place of business;

(2) the applicant's gross revenues in the most recently completed fiscal year;

(3) whether the applicant's business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) a listing of all owners, including percentage of ownership, and all officers of the applicant, with full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises that are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) all other relevant or supporting information necessary for verifying status resulting in eligibility under certification procedures if requested in writing by the

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division, before or after the annual reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the certified directory.

1230.1910 CONSULTANT, PROFESSIONAL, AND TECHNICAL PROCUREMENTS.

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of consultant, professional, and technical procurements under Minnesota Statutes, section 16B.19, subdivision 2.

Subp. 2. **Awards.** Division certification is not required for individuals who provide consultant, professional, or technical services and who are not organized as a business, corporation, partnership, proprietorship, or other recognized business structure. An individual person may be awarded contracts under Minnesota Statutes, section 16B.19, subdivision 2, provided that the contracting agency maintains records stating that the individual meets the terms governing socially or economically disadvantaged area persons established in part 1230.1500, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.1700, subparts 2 and 3; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300 are repealed.

EFFECT OF EMERGENCY AMENDMENTS. After the emergency amendments expire as provided in Minnesota Statutes, section 14.35, the permanent rules as they read prior to those amendments shall again be in effect, except as they may be subsequently amended, and all rules that were repealed in these rules shall be revived.

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Department of Administration

Proposed Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

Rules as Proposed

1230.0100 SCOPE.

Pursuant to Minnesota Statutes, chapter 16B, parts 1230.0100 to ~~1230.2300~~ 1230.1910 govern the procurement of materials and services for the state under the competitive bidding requirements.

SMALL ~~BUSINESSES-OWNED-BY-DISADVANTAGED-PERSONS~~ BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts ~~1230.1300~~ 1230.1400 to ~~1230.1900~~ 1230.1910 are ~~promulgated~~ adopted pursuant to Minnesota Statutes, sections 16B.19 to 16B.22 ~~and-645.445~~ for the purpose of ~~establishing~~ governing procurement procedures relating to the ~~small-business-and-small-business-owned-by-socially-or-economically-disadvantaged-persons-set-aside-program~~ preference programs for targeted group or economically disadvantaged area small businesses. These programs are administered by the Materials Management Division ~~of-Procurement~~, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155. ~~Parts-1230.1300-to-1230.1900-shall-also-govern-procurement-under-this-program.~~

1230.1500 SCOPE.

~~Subpart-1.--Priority-of-set-aside-rules.~~ In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to ~~1230.1300~~ 1230.1399 and ~~these-rules~~ parts 1230.1400 to 1230.1910 relating specifically to the ~~set-aside~~ small business procurement program, ~~the-rules-of-the-set-aside-program~~ parts 1230.1400 to 1230.1910 shall govern.

1230.1550 DEFINITIONS.

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~~Subp.-2.--Definitions.~~ Subpart 1. Scope. The definitions contained in ~~Minnesota-Statutes,-section-645.445~~ part 1230.0200 shall apply in the administration of ~~the-set-aside-program~~ these preference programs. ~~In-addition,~~ The ~~following~~ definitions in subparts 2 to 25 shall also apply.

~~Subp.-3.--Terms-governing-minorities.--The-terms-"racial minorities,"-"women,"-and-"persons-who-have-suffered-a substantial-physical-disability"-contained-in-Minnesota Statutes,-section-645.445,-subdivision-5-shall-have-the following-meanings:~~

~~A.--"Racial-minorities"-means-all-persons-in-one-or more-of-the-following-categories:~~

~~(1)-"Black-(not-of-Hispanic-origin)"-means-all persons-having-origins-in-any-of-the-Black-racial-groups-of Africa:~~

~~(2)-"Hispanic"-means-all-persons-of-Mexican, Puerto-Rican,-Cuban,-Central-or-South-American,-or-other-Spanish culture-or-origin,-regardless-of-race:~~

~~(3)-"Asian-or-Pacific-Islander"-means-all-persons having-origins-in-any-of-the-original-peoples-of-the-Far-East, Southeast-Asia,-the-Indian-subcontinent-or-the-Pacific-Islands. This-area-includes,-but-is-not-limited-to,-China,-Vietnam, Japan,-Korea,-the-Philippine-Islands,-and-Samoa:~~

~~(4)-"Alaska-native"-means-all-persons-having origins-in-any-of-the-original-peoples-of-North-America-and-who maintain-cultural-identification-through-tribal-affiliation:~~

~~(5)-"Indian"-means-an-individual-having-origins in-any-of-the-original-people-of-North-America-who-is-an enrolled-member-of-an-Indian-tribe-recognized-as-such-by-the government-of-the-United-States-and-Canada:~~

~~B.--"Women"-means-all-persons-of-the-female-gender:~~

~~C.--"Persons-who-have-suffered-a-substantial-physical disability"-means-all-persons-suffering-a-physical-impairment that-is-likely-to-cause-difficulty-in-securing,-retaining, and/or-advancing-in-employment,-and-that-substantially-limits one-or-more-of-his-or-her-major-life-activities,-including-but~~

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~~not-limited-to-visual,-hearing,-or-special-learning-impairments.~~

~~Subp.-4.--Small-business-owned-and-operated-by-disadvantaged-person.--"A-small-business-owned-and-operated-by-a-socially-or-economically-disadvantaged-person(s)"-means-a-small-business-as-defined-in-Minnesota-Statutes,-section-645.445,-subdivision-2-which-is-51-percent-owned-and-operated-on-a-day-to-day-basis-by-a-socially-or-economically-disadvantaged-person-as-defined-in-Minnesota-Statutes,-section-645.445,-subdivision-5.~~

Subp. 2. **Affiliate or subsidiary of a business dominant in its field of operation.**

A. "Affiliate or subsidiary of a business dominant in its field of operation" means a business that is at least 20 percent owned by a business dominant in its field of operation or by partners, officers, directors, majority stockholders, or their equivalent of a business dominant in that field of operation.

B. "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in part 1230.1600, subpart 3.

Subp. ~~5.~~ 3. **Broker.** "Broker" means a business that carries no inventory and that has no written ongoing agreement with any manufacturer or manufacturer's authorized distributor to sell the products of ~~such~~ the manufacturer.

Subp. 4. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. ~~6.~~ 5. **Contractor.** "Contractor" means a business that is engaged in construction ~~including-but-not-limited-to~~ such as general, mechanical, and/or electrical contracting, or that provides a specific service ~~including-but-not-limited-to~~ such as trash removal, snow removal, janitorial services, or consultant, professional, or technical services.

Subp. ~~7.~~ 6. **Dealer, jobber, or distributor.** "Dealer," "

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jobber," or "distributor" means a business that maintains a store, warehouse, or other establishment in which a line or lines of products are kept in inventory and are sold to the public on a wholesale and/or retail basis.

Subp. 7. **Debarment.** "Debarment" means the disqualification of a person to receive invitations for bids or requests for proposals, or the award of any contract by any governmental body, for a specified period of time commensurate with the seriousness of the offense, the failure, or the inadequacy of performance.

Subp. 8. **Director.** "Director" means director of the Materials Management Division or a materials management division manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Material Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means any operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, which does not provide the operator with the exclusive right to profit from his or her effort, commensurate with ownership and to bear the risk of loss or failure and does not meet the test of ownership outlined in subpart 24 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Full-time equivalent employees.** "Full-time equivalent employees" are determined by dividing the total hours worked by all employees in the business during the preceding fiscal year by 2,088 hours.

Subp. ~~8.~~ 12. **Joint venture.** "Joint venture" means the association of two or more businesses, all of which ~~are certified~~ businesses ~~in the small business~~ are certified as a targeted group and/or ~~small business owned and operated by socially and~~ economically disadvantaged ~~persons program~~, for the purpose of receiving a procurement bid award.

Subp. 13. **Liquidated damages.** "Liquidated damages" means

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a specific sum of money, agreed to as part of a contract to be paid by one party to the other in the event of a breach of contract in lieu of actual damages, unless otherwise provided by law.

Subp. ~~9.~~ 14. **Manufacturer.** "Manufacturer" means a business that makes and/or processes raw materials into a finished product.

Subp. ~~10.~~ 15. **Manufacturer's representative.** "Manufacturer's representative" means a business that has a written agreement or agreements with one or more manufacturers or manufacturer's authorized distributors to sell the products of ~~such manufacturer(s)~~ the manufacturer, but that is not an employee of ~~such manufacturer(s)~~ the manufacturer.

Subp. 16. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions which allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 17. **Person.** "Person" means a natural person or a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates.

Subp. 19. **Reinstatement.** "Reinstatement" means a debarred vendor may seek restoration to state bidders' lists one year from the date of debarment by submitting application to the commissioner through the Material Management Review Board. If restored, the vendor will be subject to a one year probationary period.

Subp. 20. **Responsible bidder.** "Responsible bidder" means a bidder who:

A. is not a broker of, but rather is a manufacturer of, regular dealer in, or the agent of a manufacturer with full knowledge of supplies to be furnished; or

B. if services are to be provided, has the necessary skills or is in the business of supplying these services; and

C. can demonstrate a satisfactory credit standing,

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lack of tax liability, and the financial capability to perform the contract as evidenced by the ability to obtain bonding when required; and

D. has no record of failure to perform or of unsatisfactory performance of contracts for the state or other customers and is not currently debarred by another government entity for any cause including defaults on contracts, late deliveries, products not meeting specifications, substandard installation, or service; and

E. is otherwise qualified under rule and law, including incorporation in or registration to do business in Minnesota; and

F. has not engaged in unlawful practices, associated with organized crime, operated under false names or fronts as small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G under part 1230.1500, subpart 20.

Subp. 21. **SIC or Standard Industrial Classification.** "SIC" or "Standard Industrial Classification" was developed for use in the classification of business establishments by type of activity, for the purpose of facilitating the collection, tabulation, presentation, and analysis of data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations, for promoting uniformity and comparability in the presentation of statistical data relating to those establishments and their fields of endeavor.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended from consideration for award of contracts by the director of Materials Management while the director determines if there is probable cause for debarment. The suspension shall not be for a period exceeding six months.

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Subp. 23. **Targeted group businesses.** "Targeted group businesses" means those certified businesses designated by the commissioner of administration that are majority owned and operated by women, persons with disabilities, or specific minorities and provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially disadvantaged persons.** "Racial minority," "women," and "persons who have suffered a substantial physical disability" shall have the following meanings.

A. "Racial minority" means all persons in one or more of the following categories:

(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.

(2) "Hispanic" means all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands. This area includes China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.

(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.

(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the governments of the United States and Canada.

B. "Women" means all persons of the female gender.

C. "Persons who have suffered a substantial physical disability" means all persons with a physical impairment that is likely to cause difficulty in securing, retaining, or advancing in employment, and that substantially limits one or more of his or her major life activities.

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Subp. ~~11.~~ 25. **Third-party lessor.** "Third-party lessor" means a business that as a lessee acts as a lessor to a third party.

Subp. 26. **Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business.** "Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" means a small business entity with its principal place of business in Minnesota organized for profit, including any individual, partnership, corporation, joint venture, association, or cooperative, which entity is 51 percent owned and operated on a day-to-day basis by citizens of the United States of America.

1230.1600 ELIGIBILITY FOR ~~SET-ASIDE~~ SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Subpart 1. **Eligible businesses.** The following businesses ~~shall be~~ are eligible for participation in the ~~set-aside~~ socially disadvantaged or economically disadvantaged area small business program: manufacturer, manufacturer's representative, dealer, jobber, distributor, contractor, and businesses engaged in a joint venture.

Subp. 2. **Ineligible businesses.** The following businesses ~~shall~~ are not be eligible for participation in the ~~set-aside~~ socially disadvantaged or economically disadvantaged area small business program: brokers ~~and~~, third-party lessors, and franchises.

Subp. 3. **Revenue or sales limitations; Minnesota Small Business Program.** For the purpose of identifying businesses eligible to participate in the Minnesota Small Business Program, the preference and set-aside programs for targeted group small businesses; or for small businesses located in economically disadvantaged areas, the qualifying parameter shall be expressed in terms of gross annual revenues or sales as an upper limitation; i.e. "not to exceed." In no case shall the limitation for any category of business enterprise be set at

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less than $1,000,000.

A. Standard industrial classification (SIC) codes shall be used in classifying limitations among the variety of businesses potentially eligible for participation in the Minnesota Small Business Program.

B. Limitations, standards, shall be set for each major, two-digit, SIC group based on the following procedure:

(1) Typical financial balance sheet information compiled in annual reports such as the Robert Morris and Associates annual statement studies, Dun and Bradstreet, or similar reporting services will be used to establish the range of annual revenues or sales for a given major group class. This range shall, wherever the data is available, reflect an average of at least three consecutive reporting years, but shall not exceed five years.

(2) The upper limitation defining small business based on annual gross revenues or sales is determined by establishing a representative annual market consisting of the total gross revenues or sales generated by the reporting sample class. The lower quartile, 25 percent, of this market shall represent the small business category.

(3) The average gross revenues of the number of firms it requires to equal the total lower quartile market shall be the upper limit, defined in gross annual revenues or sales, permitted for definition of a small business in Minnesota.

(4) Where the three-digit SIC code data treated in subitems (1) to (3), varies significantly from the two-digit aggregated data or the four-digit data varies significantly from the two- or three-digit classes, a specific limitation shall be established for that three- or four-digit class.

(a) Significant variation for differences between two- and three-digit codes shall be five percent above or below the two-digit standard for gross annual revenue or sales.

(b) Significant variation for differences between three- and four-digit codes shall be five percent, or

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ten percent above or below the two-digit standard.

(5) After the initial establishment of limitations according to the process described for definition as a small business in Minnesota, for the purposes of this program, the Department of Administration shall in year two of the rule begin a process of reexamining on an annual basis one-third of the groups for appropriate limitations and redefinition where justified.

1230.1700 ~~SELF-CERTIFICATION~~ CERTIFICATION OF ELIGIBILITY.

Subpart 1. **Required information.** To ~~become eligible to receive invitations for set aside bids~~ qualify for the preference programs established by Minnesota Statutes, section 16B.19, subdivisions 2a to 2d, each business shall ~~certify and~~ file with the Materials Management Division ~~of Procurement~~ the following information on the application forms provided:

A. the name and address of the applicant and the principal place of business;

B. ~~whether applicant is applying for~~ which type of designation as a small business ~~or a small business owned and operated by a~~, socially disadvantaged small business or economically disadvantaged ~~person(s); designation shall be made as to~~ area small business, is being applied for:

(1) socially disadvantaged small businesses are those businesses defined by Minnesota Department of Administration, part 1230.1550, subpart 24; or

(2) an individual business which is not a targeted group business but is owned by a socially disadvantaged person, as defined in part 1230.1550, subpart 24, that is encountering the effects of discrimination as evidenced by the owner lacking adequate external support necessary to operate a competitive business enterprise through a diminished ability to secure:

(a) long-term or working capital financing;

(b) equipment, raw material, or supplier trade credit;

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(c) bonding and insurance; or

(d) a proportionate share of the market for its goods and services; or

(3) the small business is located in an economically disadvantaged area as defined in Minnesota Statutes, section 16B.19, subdivision 2d, and/or

(a) the owner resides or is employed in an area designated a labor surplus area by the United States Department of Labor;

(b) the owner resides or is employed in a county in which the median income for married couples is less than 70 percent of the state median income for married couples;

(c) the business is a rehabilitation facility or a work activity program as certified by the Department of Jobs and Training; or

(d) the small business owner resides or is employed in an area designated by the commissioner as an economically disadvantaged area under Minnesota Statutes, section 16B.19, subdivision 2d;

C. an indication of the type of business operated and the kinds of service, materials, or supplies which can be delivered;

~~C.--number-of-employees;~~

~~D.--gross-revenues-in-the-preceding-fiscal-year;~~

~~E.--whether-the-business-is-an-affiliate-or-subsidiary of-a-business-dominant-in-its-field-of-operation;~~

~~F.~~ D. a listing of all owners, including percentage of ownership, ~~and-all-officers-of-the-applicant-with~~ method of acquisition, ownership in other firms, and copies of the following documents:

(1) complete financial statements for the business for each of the preceding three fiscal years, or since the inception of the business if established less than three years;

(2) a profile of the owners' management responsibilities and a description of the management

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responsibilities assigned to other individuals, including a chronological resume for each owner, officer, and other key personnel;

(3) a statement indicating whether or not the business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises which are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

~~G.--all-other-relevant-information-requested-by-the division.~~

(5) proof of ownership of business. Owners shall submit proof of their ownership of the requisite percentage of the business at the time the application is submitted, and the proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, a canceled check used to purchase ownership, or other recognized proof of ownership.

(a) In the case of a sole proprietorship or where documentary proof of ownership is not available, the owner shall clearly state the reasons for such and be prepared to assist the division in further investigation of proof.

(b) If requested, the owners must show how and when the interest in the business was acquired.

(c) The division may require additional proof or information necessary to verify ownership.

E. In addition, for certification under item B, subitem (2), unit (a), (b), (c), or (d), the following information must be provided for the most recent fiscal year and the preceding four years, if the applicant has operated as a business for four years, identifying the fiscal year reporting system used by the applicant and listing in whole dollar amounts:

(1) assets:

(a) cash and equivalent: all cash,

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marketplace securities, and other near-cash items, excluding sinking funds;

(b) trade receivables (net): all accounts from trade, less allowance for doubtful accounts;

(c) inventory: anything constituting inventory for the business;

(d) all other current: any other current assets, not including prepaid items;

(e) total current: the total of all current assets shown in subitems (a) to (d);

(f) fixed assets (net): all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;

(g) intangibles (net): intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;

(h) all other noncurrent: prepaid items and any other noncurrent assets;

(i) total: total of all items listed above.

(2) liabilities:

(a) notes payable (short-term debt): all short-term note obligations, including bank and commercial paper excluding trade notes payable;

(b) current maturities (long-term debt): that portion of long-term obligations that is due within the next fiscal year;

(c) trade payables: open accounts due to the trade;

(d) income taxes payable: income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;

(e) all other current: all other current liabilities, including bank overdrafts and accrued expenses;

(f) total current: total of all current liabilities listed above;

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(g) long-term debt: all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;

(h) deferred taxes: all deferred taxes. Identify federal, state, and local taxes in subtotals;

(i) all other noncurrent: any other noncurrent liabilities, including subordinated debt and liability reserves;

(j) net worth: difference between total liabilities and total assets, including minority interest;

(k) total liabilities and net worth: total of all items listed above.

(3) income data:

(a) net sales: gross sales less returns and discounts allowed, if any;

(b) gross profit: net sales less cost of sales;

(c) operating expenses: all selling, general, and administrative expenses, including depreciation, excluding interest expense;

(d) operating profit: gross profit less operating expenses;

(e) all other expenses (net): includes miscellaneous other income less expenses, such as interest expense, miscellaneous expenses not included in general and administrative expenses netted against recoveries, interest income, dividends received, and miscellaneous income;

(f) profit before taxes: operating profit minus all other expenses (net).

F. If the business seeking certification is a contractor, the information in item E must be submitted in all categories except as modified in the following:

(1) assets:

(a) accounts receivable - progress billings: amounts billed on current contracts excluding retention;

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(b) accounts receivable - current retention: amounts held back by customers on current contracts as retention;

(c) inventory: costs attributable to equipment, small tools, supplies, and other deferred costs related to contracts in progress where a portion of the cost applies to work not yet performed;

(d) costs and estimated earnings in excess of billings: the difference between the total of costs and recognized estimated earnings to date and the total billings to date;

(e) total current: total of all current assets shown and as modified, changed, or added in the above definitions;

(f) joint ventures and investments: the total of investments and equity in joint ventures.

(2) liabilities:

(a) accounts payable - trade: open accounts and not obligations due to the trade;

(b) accounts payable - retention: amounts held back as retention in payments to subcontractors on current contracts;

(c) billings in excess of costs and estimated earnings: the difference between the total billings to date and the total of costs and recognized estimated earnings to date;

(d) total current: total of all current liabilities shown and as modified, changed or added in the above definition;

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in the above definitions.

(3) income data:

(a) contract revenues: revenues recognized under percent of completion method (in place of net sales).

G. In separate schedules, all applicants applying

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under item E or F should show the amounts attributable to depreciation, depletion, amortization, interest income, interest expenses, officers' compensation, and miscellaneous income shown as passive or nonpassive income. A schedule of leased assets with a brief description of type and dollar value must be submitted. A brief outline describing shareholders equity must be submitted, when applicable, for the type of company organization.

In addition, supportive documentation must be submitted when seeking certification under various provisions as follows:

(1) item B, subitem (2), unit (a): for certification as lacking adequate external support in obtaining long-term or working capital financing, any documentation showing denial of loans or offers of loans at terms and rates not currently normal for similar enterprises;

(2) item B, subitem (2), unit (b): for certification as lacking external support in obtaining equipment, raw materials, or supplier trade credit, any documentation showing denial of credit or credit extended at terms, conditions, and rates in excess of the norm expected within similar enterprises;

(3) item B, subitem (2), unit (c): for certification as lacking adequate external support in obtaining bonding and insurance, any documentation showing inability to obtain bonding or insurance at rates and terms normally expected within the industry segment of the applicant.

(4) In all cases, adequacy of documentation, accuracy of financial data, and development of argument and positions with regard to an applicant's lack of external support within any of the four categories of item B, subitem (2), unit (a), (b), (c), or (d), rests with the applicant and must be submitted in writing with the application for certification. The division retains the right of inquiry and verification of all information submitted.

H. When seeking certification under any provision of item B, subitem (1), (2), or (3), or any other certification

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provision, the applicant shall provide all other relevant or supporting information requested by the division.

I. Denials of certification under these provisions are subject to appeal under subpart 7.

Subp. 2. and 3. [See Repealer.]

Subp. 4. **Notice of changes.** The director of the division ~~of Procurement~~ shall be notified in writing of any ~~and all changes~~ change in the ~~applicant's business which may alter the~~ application or attached information ~~provided above~~ within 30 days of ~~such change(s)~~ the changes.

Subp. 5. **Grounds for rejecting ~~self certification~~ application.** ~~Each~~ An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the ~~self certification~~ application form and all supporting documents required by the division ~~of Procurement~~. An application shall be rejected on any of the following grounds:

A. the applicant is dominant in its field of operation or is an affiliate or subsidiary of a business dominant in its field of operation;

B. the applicant has failed to provide all relevant required information;

C. ~~where applying for designation as a business owned and operated by socially or economically disadvantaged person(s),~~ the applicant failed to establish that majority ownership and day-to-day operating control are held by socially disadvantaged small business or economically disadvantaged area small business person(s);

D. the applicant has failed to comply with laws and rules of the state relating to procurement;

E. ~~applicant's failure to comply with the requirements of these rules or Minnesota Statutes, section 16B.19, et seq. faith in application for inclusion in this program, and~~ the applicant has intentionally or negligently falsified application information;

F. the applicant is a broker and/or third-party lessor, or operates as a franchiser or franchisee;

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G. the applicant's principal place of business is not in Minnesota;

H. ownership of the applicant's business is shared with a previously certified participant who was removed from the bid eligibility list or directory of certified businesses by operation of Minnesota Statutes, section 16B.22, clause (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item I, subitem (2), unit (a), when applying as an individual business under subpart 1, item B, subitem (2).

Subp. 5a. **Criteria for determinations.** The following standards shall be used in determining whether, under subpart 5, item C, a firm is owned and operated on a day-to-day basis by one or more socially or economically disadvantaged persons:

A. The individual's claim, supported by sufficient documentation, that he or she is a socially disadvantaged small business person or an economically disadvantaged area small business person as defined in these rules.

B. The ownership and day-to-day operation of a socially disadvantaged small business or economically disadvantaged area small business must be real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents. The socially disadvantaged or economically disadvantaged small business owners must have the customary incidents of business ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than form of the business arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient. The division shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial arrangements, equipment rental or leasing agreements, and relationships with nontargeted businesses that vary from

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accepted industry practice.

C. The socially disadvantaged or economically disadvantaged area business owner must possess the power to direct the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operation. The firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially or economically disadvantaged owners. There must be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially or economically disadvantaged business owners from making a business decision for the firm without the cooperation or vote of any owner who is not a socially or economically disadvantaged person.

D. If the owners of the firm who are not socially or economically disadvantaged persons are disproportionately responsible for the operation of the firm, then the firm will not be considered to be owned and operated by socially or economically disadvantaged persons.

E. All securities that constitute ownership or control or both ownership and control of a corporation must be held directly by socially or economically disadvantaged persons. No securities held in trust or by any guardian for a minor will be considered as held by socially or economically disadvantaged persons in determining the ownership or control of a corporation.

F. The contributions of capital or expertise by the socially or economically disadvantaged owners to acquire their interests in the firm must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or participation as an employee only, rather than as a manager.

G. In addition to the standards in items A to F, the following circumstances will be given special consideration in

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determining eligibility:

(1) newly formed firms and firms whose ownership or day-to-day operating control or both ownership and control has changed will be closely scrutinized to determine the reasons for the timing of the formation or of a change in the firm;

(2) a previous or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities referred to in subpart 5 and this subpart;

(3) any relationship between a socially disadvantaged or economically disadvantaged area business and a business that is not a socially disadvantaged or economically disadvantaged area business that has an interest in the socially disadvantaged or economically disadvantaged area business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

H. The combined gross sales or revenues from businesses operated by the same owners in related fields exceed the highest size standard for the field defined under part 1230.1600, subpart 3.

I. The following standards, along with supporting documentation, shall be used in reaching a determination to certify an applicant under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d):

(1) Financial data for the company seeking certification shall be analyzed using formulas, techniques, processes, and ratios used in the annual statement studies published by Robert Morris and Associates (RMA), Philadelphia. Where RMA data does not reflect or provide adequate comparable data for the applicant's main line of business, the "Industry Norms and Key Business Ratios," published by Dun and Bradstreet Credit Services, or any similar representative reporting service may be used.

(2) Certification determination will be made upon careful review of all the evidence submitted. However, to

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establish eligibility for this review, the financial data applicable to the applicant company shall fall within the following parameters:

(a) financial ratios: at any point between the lower quartile and the upper quartile. Upper quartile ratings are indicative of a successful company not in need of the assistance provided through certification. Lower quartile ratings indicate a need for additional assistance before certification. Lower quartile businesses will be referred to the Department of Trade and Economic Development for remedial assistance before becoming eligible for reconsideration for certification.

(3) The following ratios and formulas will be used to determine eligibility for certification:

(a) lacking adequate external support in obtaining long-term or working capital financing: earnings before interest and taxes (EBIT)/interest, sales/working capital, quick ratio, fixed/worth, debt/worth;

(b) lacking adequate external support in obtaining equipment, raw materials, or supplier trade credit: current ratio, quick ratio;

(c) bonding and insurance: none - review of documentation only;

(d) the business has not captured a proportionate share of the market for its goods and services, based on the most current annual statement studies published by RMA. The national average revenues appropriate for the applicant business's standard industrial code and asset size will be divided by the national average assets determined similarly and multiplied by the applicant's actual total assets to indicate a proportionate market share. The applicant business's actual revenues will be divided by this proportionate market share to indicate the actual percentage of the proportionate market attained. Any percentage at 75 or less shall qualify for eligibility.

(4) If eligible under subpart 1, item B, subitem

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(2), unit (a), (b), (c), or (d), all other documentation shall be reviewed to arrive at a determination to grant or deny certification. The key determinant is "lacking adequate external support...as evidenced by diminished ability to secure..." Even though an applicant qualifies as an eligible business on the basis of financial ratios, if the business has been able to secure sufficient loans, bonding, insurance, or credit at the usual industry norms, it is not qualified as there is no evidence showing lack of support. Conversely, the business may show adequate financial ratios but still find itself unable to obtain any, or only partial, amounts of financing, bonding, credit, or insurance needed to remain competitive, or it can only acquire such at unfavorable terms not normal for its industry segment. Upon finding that such circumstances are not a result of internal management deficiencies as indicated by ratios appropriate to these concerns such as the following:

(a) percent profit before taxes/tangible net worth;

(b) percent profit before taxes/total assets;

(c) percent depreciation, depletion, amortization/sales; and

(d) percent officers' compensation/sales;

the business can be certified as a targeted group business. The same management efficiency review shall apply when determining certification due to an inability to capture a proportionate market share; however, no other documentation will need be considered under this eligibility criterion. Findings that a business suffers from internal management deficiencies will require a denial of certification until remedial assistance has been obtained through referral to the Department of Trade and Economic Development for help from public or private resources. When the appropriate ratio indicators fall within the eligible zone, the business may again apply for certification.

The impact of both short- and long-term business cycles for

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the economy in general and for the particular business segment in specific shall be considered in arriving at certification findings. When appropriate, an average of two to five years of fiscal data for the applicant company shall be used in determining ratio values.

(5) Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines shall be reviewed for certification under those distinctions. If the company operates in more than one SIC classification, the review shall be made under the primary industry segment if 75 percent or more of its net sales or contract revenues are generated by that segment. The business may seek certification for individual product, service, commodity, or construction activities if 25 percent or more of its net sales or contract revenues is generated by a given category. All other financial data required by this application process must be proportionately attributed to the categories for which certification is sought unless it can be conclusively demonstrated that the dollar amounts shown are directly attributable to specific elements. If the company is unable to provide the breakdown of financial data requested by this rule, it must accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of rejection of application.** After an applicant has received written notice of rejection of ~~its~~ the application ~~to participate in the set-aside program~~ for certification as a socially disadvantaged small business or economically disadvantaged area small business, the applicant may appeal ~~this~~ the decision in writing to the ~~director of the Division of Procurement~~ commissioner of administration within ~~30~~ 15 calendar days of receipt of ~~such notice~~ the determination. ~~The director shall render a decision in writing on the application within 30 days of receipt of the appeal. If the applicant's rejection is sustained by the director, applicant may appeal this decision in writing to the commissioner of administration within 30 days of receipt of such~~

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~~determination.~~ If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if ~~feasible~~ time permits, refer the appeal to the Small Business Procurement Advisory Council for its recommendation before reaching a final decision. The commissioner shall ~~render the~~ make a final decision in writing within ~~30~~ 45 calendar days of receipt of ~~such~~ the appeal.

1230.1800 ~~ESTABLISHMENT OF SET-ASIDE~~ PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

~~Subpart 1. List of set-aside businesses.~~ A ~~list~~ directory of ~~set-aside~~ eligible businesses, ~~properly~~ certified pursuant to part 1230.1700 shall be established and maintained by the division for various commodity classes.

~~Subp. 2. Determination of contracts for set-aside. When a requisition is received by the Division of Procurement and is placed on the list of set-aside contracts, the contract for a particular commodity shall be offered to those businesses on that commodity list and awarded as follows:~~

~~A. For all such requisitions, the Division of Procurement shall establish an estimated price for the goods or services.~~

~~B. All businesses on the set-aside list shall be notified of the estimated price.~~

~~C. First attempt at purchase shall be made from a small business owned and operated by a socially or economically disadvantaged person(s).~~

~~D. Where there is only one business in a given commodity class the business shall be invited to submit a bid based on the estimated price.~~

~~E. Where there are two or more businesses in a given commodity class, competitive bids shall be obtained.~~

~~F. Acceptable bids shall be recorded and the award~~

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~~made-to-the-lowest-responsible-bidder.~~

~~G.--No-award-shall-be-made-when-the-low-bid-is-more than-five-percent-over-the-estimated-price.~~

~~H.~~

1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES.

The division shall attempt to achieve utilization of socially disadvantaged small businesses in proportion to their representation in the market. In so doing, the division may use either of the following purchasing methods for awarding requisitions to those socially disadvantaged businesses designated by the commissioner as targeted group businesses.

A. When it is likely that three competitive bids will be obtained from certified targeted group small businesses, the requisition may be set aside for bidding only by those businesses.

(1) The division shall include a statement on the invitation to bid informing all vendors that the bid is set aside for bidding only by certified targeted group small businesses.

(2) The division shall reject any bid by a business not certified as a targeted group small business.

(3) Where there are no bids or no acceptable bids, unsatisfactory bids, if any, will be recorded and the requisition shall ~~thereafter~~ be rebid ~~through-normal-procurement procedures~~.

~~I.--If-it-is-necessary-to-reject-original-bids-and-the bid-specifications-are-substantially-changed-or-were-in-error, specifications-shall-be-revised-and-the-project-rebid-under set-aside-rules.~~

~~J.--If-an-acceptable-bid-is-received-and-awarded-under normal-procurement-procedures,-the-cost-or-price-shall-be recorded-for-report-purposes.~~

B. A certified targeted group small business may be awarded up to a six percent preference in the amount bid over

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the lowest responsible bid from another vendor.

(1) The division shall include a statement on the invitation to bid informing all vendors that certified targeted group vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

(2) When the lowest acceptable bid from a certified targeted group small business is within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified targeted group small business.

(3) When there is no acceptable bid from a certified targeted group small business within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING, OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction, consulting, or professional or technical services to targeted group small businesses.

A. Goals for subcontracting ~~may be independently set for each contract and may vary from contract to contract, depending on~~ the type of work involved and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers

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from the normal subcontracting goals according to the following procedure:

A. The invitation to bid or request for proposals may as one of the conditions of contract waive subcontracting requirements for all or specific specialties based on the division's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

B. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof shall accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

C. After the award and the commencement of the project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Bid documents will state whether or not the incentive rule applies for the project being bid. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at $50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25

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percent. Contracts between $2,000 and $50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500 in potential subcontracting awards.

(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or $60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

(a) subtract the established goal plus three percent from 25 percent;

(b) divide six percent of the project or $60,000, as appropriate, by the number of percentage points in unit (a); and

(c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed $60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the Materials

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Management Review Board. The board may uphold, modify, or reject the penalty. The decision of the board may be appealed within 30 calendar days to the commissioner. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, or, if feasible, may affirm or reject the board's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000, added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the underuse determined in the bid proposal as compared to the announced project goal.

D. The division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A certified economically disadvantaged small business may be awarded up to a four percent preference in the amount bid over the lowest responsible bid from another vendor.

A. The division shall include a statement on the invitation to bid informing all vendors that certified economically disadvantaged vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

B. When the lowest acceptable bid from a certified economically disadvantaged small business is within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified economically

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disadvantaged small business.

C. When there is no acceptable bid from a certified economically disadvantaged small business within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

D. When the division awards both a preference to a certified targeted group small business and a preference to a certified economically disadvantaged small business on the same requisition, the lowest acceptable bid shall be determined by deducting the preference percent awarded from the acceptable bid by the certified small business.

1230.1850 REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES.

Subpart 1. **Removal for failure to fulfill contract.** A business shall be removed from the bid eligibility lists and shall be ineligible to be awarded contracts when it fails to satisfactorily fulfill the terms and conditions of a contract. Removal or debarment by other governmental entities shall automatically result in removal from these bid eligibility lists as well. Notice of removal from bidding lists and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under this subpart may apply for reinstatement and participation in the preference program and may be listed if the division determines that the business is able to undertake and satisfactorily complete future contracts. As part of the reinstatement evaluation process, the division may require the applicant to provide in writing:

A. an explanation of the steps taken by the applicant to resolve the production, financial, or technical problems that caused its previous failure to perform; or

B. evidence of successful completion of at least four other contracts, including contracts with two public entities,

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in the same commodity class, field, or type of work in which the applicant seeks to bid or completion of the requirements for reinstatement and probation.

Subp. 3. **Removal from certified directory when a business no longer qualifies.** A business shall be removed from the certified directory and will no longer be eligible for bidding on any set-aside or preference contract when the business no longer qualifies for these preference program under Minnesota Statutes, section 16B.22, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business. When removal is for loss of status as an economically disadvantaged area, the business shall remain eligible for 120 days after certified small businesses in the area are notified of the termination of the status by the division.

Subp. 4. **Appeal of removal.** When a business is removed from the bid lists and disqualified from further bidding under subpart 1, 2, or 3 or is removed from the certified directory, the business may appeal the removal and disqualification to the commissioner of administration in writing within 15 calendar days of the receipt of the notice of removal. Receipt of the appeal shall be acknowledged by the commissioner in writing within 15 calendar days of receipt. The commissioner shall request that the business choose either an informal review of the disqualification under item A or a formal review under item B if facts of the matter are in dispute.

A. Under an informal review process, the Small Business Procurement Advisory Council shall consider whether the decision to remove a business from the bid list or certified directory was reasonable and whether the removal is in compliance with subpart 1 or 2. The council will review the facts presented by the business and the division. Within 45 calendar days of the council's receipt of a request for review, the council shall recommend that the commissioner take one of the following actions:

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(1) reinstate the business on the bid lists or certified directory;

(2) affirm the removal of the business; or

(3) refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62.

The council's recommendation to the commissioner shall be in writing and include the reasons for its decision. The commissioner shall consider the recommendation and make a final decision on the matter within 15 calendar days of receiving the council's recommendation. The commissioner shall include written reasons for the decision.

B. Within 30 calendar days after a request by the business or the council for formal review, the commissioner will initiate a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, by filing a request for assignment of an administrative law judge with a notice of an order for hearing. When the commissioner receives the report of the administrative law judge, the commissioner shall forward the report to the Small Business Procurement Advisory Council for its review, and the council shall, within 45 days, make its recommendation. The commissioner shall make a final decision on each appeal.

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

To ensure equitable distribution of awards and reduce the dependency of any given business on state awards for a major part of its annual revenues, the following limitations apply:

A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these program to that business exceed three-tenths of one percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute, the Department of

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Administration, the Department of Transportation, and the University of Minnesota.

B. Eligibility for set-aside or preference for a specific business shall be terminated when the annual review of financial statements or the cumulative record of awards compiled by the division from reports submitted by agencies covered under the statute indicate that any of the following conditions exist:

(1) more than an average of 80 percent of the business's gross revenues or sales are attained through preference or set-aside awards during the second and third years of participation in the program;

(2) for years four and five, the limitation average shall be 50 percent of gross annual revenues or sales;

(3) for years six and beyond, the limit shall not exceed 40 percent.

There will be no limit on awards acquired through the normal competitive bid process at any time.

C. No business shall be permitted to participate in the preference and set-aside programs indefinitely. A business will not be certified but will graduate from the preference and set-aside programs when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

(2) demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area; or

(3) the business has captured a proportionate share in its market for assets employed, by the following averages:

(a) 200 percent in year one;

(b) 175 percent in years one and two;

(c) 150 percent in years one, two, and

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three;

(d) 125 percent in years two, three, and four;

(e) 125 percent in years three, four, and five, or any three consecutive years thereafter.

1230.1900 GENERAL TERMS AND CONDITIONS.

Subpart 1. **Inability to perform.** ~~A~~ An eligible business ~~which, if offered an award,~~ that finds ~~that~~ it cannot produce, supply, or construct according to the bid terms and conditions of a contract for reasons beyond its control shall~~,~~ ~~within seven calendar days after receipt of notice as low bidder,~~ immediately notify the division ~~of Procurement~~ in writing of the reasons therefor. When the commissioner ~~of administration finds~~ determines that the ~~low bidder~~ business is unable to perform for the reasons stated, the division shall notify the Department of Trade and Economic Development ~~shall be notified by the Division of Procurement in accordance with Minnesota Statutes, section 16B.20,~~ so that the commissioner of trade and economic development can assist the small business in attempting to remedy the causes of the inability to perform. The division shall notify the business of the referral to the Department of Trade and Economic Development and the notice shall include a statement that any records of the Department of Trade and Economic Development in assisting the small business may be discoverable in a contested case or judicial procedure. Failure to enter into ~~the~~ a contract ~~or~~, to accept an offered award, or to satisfactorily complete a contract for documented reasons beyond its control will not automatically disqualify a business from further bidding. ~~The records of the Procurement Division shall show the reason(s) for such failure.~~

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business's

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inability to perform. If the division decides that delay is inappropriate because of the nature of the bid or contract, the division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

B. Failure of the business in question to reasonably cooperate with either the division or the Department of Trade and Economic Development shall be considered a failure to fulfill the terms of a contract and shall be handled according to part 1230.1850, subpart 1. The records of the division shall document the actions taken relative to each case of inability to perform handled under this subpart.

Subp. 2. to 4. [See Repealer.]

Subp. 5. **Dividing bid invitations.** The director of the division ~~of Procurement may~~ shall divide bid invitations by dollar amounts, units of production, or duration of contract to facilitate awarding set-aside or preference contracts ~~to business in the set-aside program~~ wherever the division is ~~considered feasible~~.

Subp. 6. [See Repealer.]

Subp. 7. **Annual reporting requirement.** The following reporting requirements apply to the socially disadvantaged or economically disadvantaged area small business programs:

A. Businesses eligible to participate in these programs shall, within 30 calendar days of a request by the division, verify information on file with the division for that business, make any necessary changes, and submit a complete financial statement to the division. The information on file with the division will include:

(1) the name and address of the applicant and its principal place of business;

(2) the applicant's gross revenues in the most recently completed fiscal year;

(3) whether the applicant's business is an affiliate or subsidiary of a business dominant in its field of operation;

Approved by Revisor _____

(4) a listing of all owners, including percentage of ownership, and all officers of the applicant, with full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises that are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) all other relevant or supporting information necessary for verifying status resulting in eligibility under certification procedures if requested in writing by the division, before or after the annual reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the certified directory.

1230.1910 CONSULTANT, PROFESSIONAL, AND TECHNICAL PROCUREMENTS.

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of consultant, professional, and technical procurements under Minnesota Statutes, section 16B.19, subdivision 2.

Subp. 2. **Awards.** Division certification is not required for individuals who provide consultant, professional, or technical services and who are not organized as a business, corporation, partnership, proprietorship, or other recognized business structure. An individual person may be awarded contracts under Minnesota Statutes, section 16B.19, subdivision 2, provided that the contracting agency maintains records stating that the individual meets the terms governing socially or economically disadvantaged area persons established in part 1230.1500, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.1700, subparts 2 and 3; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300 are repealed.

Approved by Revisor _____

EFFECT OF EMERGENCY AMENDMENTS. After the emergency amendments expire as provided in Minnesota Statutes, section 14.35, the permanent rules as they read prior to those amendments shall again be in effect, except as they may be subsequently amended, and all rules that were repealed in these rules shall be revived.

Approved
by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

AGENCY: Department of Administration

MINNESOTA RULES: Chapter 1230

The attached rules are approved for publication in the State Register

Paul M. Marinac
Assistant Deputy Revisor

DEPARTMENT: Office of the Attorney General

STATE OF MINNESOTA

OFFICE MEMORANDUM

DATE: October 12, 1990

TO: ROBERT J. BALDWIN
Materials Management Division
Department of Administration

FROM: CHARLENE HATCHER
Special Assistant Attorney General
525 Park Street, Suite 500 (55103)

PHONE: 296-9422

SUBJECT: In the Matter of the Adopted Rule Relating to the Small Business Procurement Program

The above-referenced rule has been approved as to its legality by the Attorney General on October 12, 1990.

Enclosed is your copy of the approved rule. This office has already filed two copies with the Secretary of State, who will forward one copy to the Revisor of Statutes. The fourth is being retained by this division of the Attorney General's Office for its records.

Also enclosed are any petitions, requests, submissions or comments along with any extra copies of documents which you submitted to the Attorney General.

Your next step is to arrange for publication of the Notice of Adoption in the State Register. In a day or two, you should receive from the Revisor's Office three copies of tne notice of adoption of your rule. You should submit two copies of the Notice of Adoption to the State Register for publication. A permanent rule without a hearing does not become effective until five days after a notice of adoption is published in the State Register in accordance with Minn. Stat. § 14.27. An emergency rule becomes effective five working days after approval by the Attorney General; however, the agency must publish a notice in the State Register in accordance with Minn. Stat. § 14.34.

If you have any questions in this regard, please contact me.

CH:sc
Enclosures
cc: William Brown, Chief Judge
MaryAnn Hruby
Martha J. Casserly

RULE REVIEW CHECKLIST
RESUBMITTED RULE

File No. 1732 Docket No. 05.0009.0005

RESUBMISSION DATE 9-28-90 ADOPTED W/O HEARING ____
DATE DUE 10-12-90 EMERGENCY RULE ✓

APPROVED 10-12-90 REVISOR APPROVED ____
DISAPPROVED ____ REVISOR DISAPPROVED ____
WITHDRAWM ____ FILED W/SEC. STATE 10/12/90
RETURNED TO AGENCY 10/12/90

NO **Does the revision raise significant new legal issues?**

____ Review date

✓ Rule as adopted (4 copies)

✓ Supplemental Findings of Fact, Conclusions & Order Adopting

NA Board's Supplemental Resolution Adopting

NA Notice of submission to Attorney General

NA Affidavit of Mailing Notice to Attorney General

10 day

CH

RULE REVIEW CHECKLIST

File No. 1732
DATE RECEIVED 9-12-90
REVIEW DATE
DUE DATE 9-26-90
(DIS)APPROVED
WITHDRAWN

Docket No. 05 0007 0025
ADOPTED W/O HEARING
EMERGENCY RULE ✓
TO REVISOR ON 9/14/90
REVISOR (DIS)APPROVED
FILED W/SEC. OF STATE
RETURNED TO AGENCY

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
May 29, 1990 Date published in State Register
2 none Comments

~~Petition for Adoption of a Rule~~

~~Board's Authorizing Resolution~~
~~Date adopted~~

✓ Proposed Rule
✓ Revisor's Certificate

✓ Notice of Intent to Adopt Rule
16B.22 Statutory Authority
NA Small Business Statement
NA Expenditure of public money statement
July 23, 1990 Signature

Statement of Need and Reasonableness (if applicable)
Small Business Statement
Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
Sept. 11, 1990 Dated 30/25 days before adoption
Notice attached indicates it is attached
Copy of rule or summary attached
affidavit of not having a mailing list.

✓ Publication in State Register
July 30, 1990 Date 30/25 days before adoption

180-day deadline from:
Effective date of law requiring rule (14.12) (both rules) amendments ~~don't apply~~
end of comment period (§ 14.26) (rules without hearing)
✓ effective date of statutory authority (§ 14.29) (emergency rules) may adopt Emergency Rules

~~Resolution Adopting~~
~~Date adopted~~

✓ Findings of Fact, Conclusions & Order Adopting
Sept 7, 1990 Date

~~Written Requests, Submissions or Comments~~

✓ Declaration of Attorney
Mary Casserly Name of SAAG representing agency

Notice of Submission to Attorney General (if applicable)

Affidavit of Mailing Notice to Attorney General (if applicable)

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Emergency Rule Amendments Relating to the Small Business Procurement Program

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING EMERGENCY RULE

This order supplements my FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING EMERGENCY RULE dated September 7, 1990.

The rule was withdrawn from consideration by the Attorney General on September 26, 1990, and is being resubmitted to that office with the following amendments:

1. Rule 1230.1700, Subp. 6 (page 21, line 35) "feasible" is unclear; the rule is amended by deleting "feasible" and inserting "time permits".

2. Rule 1230.1820, Subp. 1.A. (page 23, lines 17 through 19), to clearly explain how goals are set; the rule is changed by deleting everything from line 17 "may" through line 19 "on" and inserting "will depend upon".

3. Rule 1230.1820, Subp. 4.B. (page 25, lines 32 through 34) the Materials Management Review Board was deleted because it was not defined and not yet established. In addition, it is the Director of Materials Management who makes this decision. Therefore, the rule is amended by deleting line 32 "Materials" through line 33 "Board." and replacing with "director or the director's designee."; by deleting line 33 "board" and replacing with "director", and by deleting line 34 "board" and replacing with "director".

4. Rule 1230. (page 32, line 7 through 8) to be consistent with Minnesota Statutes Section 16B.19, Subd. 1; the rule is amended by deleting "wherever the division is considered" and replacing with "where economically".

None of the amendments are substantial as they do not affect new classes of persons, introduce new subject matter, nor make any substantive change so as to invite reaction.

NOW, THEREFORE, IT IS ORDERED that the rule identified as emergency rules relating to the Small Business Procurement Program as modified by this Order is adopted this 28th day of September, 1990, pursuant to the authority vested in me by Laws of 1990, Chapter 541, Section 30.

Sandra J. Hale
Commissioner of Administration

Department of Administration

Adopted Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

Rules as Adopted

1230.0100 SCOPE.

Pursuant to Minnesota Statutes, chapter 16B, parts 1230.0100 to 1230.1910 govern the procurement of materials and services for the state under the competitive bidding requirements.

SMALL BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts 1230.1400 to 1230.1910 are adopted pursuant to Minnesota Statutes, sections 16B.19 to 16B.22 for the purpose of governing procurement procedures relating to the preference programs for targeted group or economically disadvantaged area small businesses. These programs are administered by the Materials Management Division, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

1230.1500 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and parts 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern.

1230.1550 DEFINITIONS.

Subpart 1. **Scope.** The definitions contained in part 1230.0200 shall apply in the administration of these preference programs. The definitions in subparts 2 to 25 shall also apply.

Subp. 2. **Affiliate or subsidiary of a business dominant in its field of operation.**

A. "Affiliate or subsidiary of a business dominant in its field of operation" means a business that is at least 20

percent owned by a business dominant in its field of operation or by partners, officers, directors, majority stockholders, or their equivalent of a business dominant in that field of operation.

B. "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in parts 1230.1600, subpart 3.

Subp. 3. **Broker.** "Broker" means a business that carries no inventory and that has no written ongoing agreement with any manufacturer or manufacturer's authorized distributor to sell the products of the manufacturer.

Subp. 4. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 5. **Contractor.** "Contractor" means a business that is engaged in construction such as general, mechanical, and/or electrical contracting, or that provides a specific service such as trash removal, snow removal, janitorial services, or consultant, professional, or technical services.

Subp. 6. **Dealer, jobber, or distributor.** "Dealer," "jobber," or "distributor" means a business that maintains a store, warehouse, or other establishment in which a line or lines of products are kept in inventory and are sold to the public on a wholesale and/or retail basis.

Subp. 7. **Debarment.** "Debarment" means the disqualification of a person to receive invitations for bids or requests for proposals, or the award of any contract by any governmental body, for a specified period of time commensurate with the seriousness of the offense, the failure, or the inadequacy of performance.

Subp. 8. **Director.** "Director" means director of the Materials Management Division or a materials management division manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Material Management

Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means any operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, which does not provide the operator with the exclusive right to profit from his or her effort, commensurate with ownership and to bear the risk of loss or failure and does not meet the test of ownership outlined in subpart 24 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Full-time equivalent employees.** "Full-time equivalent employees" are determined by dividing the total hours worked by all employees in the business during the preceding fiscal year by 2,088 hours.

Subp. 12. **Joint venture.** "Joint venture" means the association of two or more businesses, all of which businesses are certified as a targeted group and/or economically disadvantaged, for the purpose of receiving a procurement bid award.

Subp. 13. **Liquidated damages.** "Liquidated damages" means a specific sum of money, agreed to as part of a contract to be paid by one party to the other in the event of a breach of contract in lieu of actual damages, unless otherwise provided by law.

Subp. 14. **Manufacturer.** "Manufacturer" means a business that makes and/or processes raw materials into a finished product.

Subp. 15. **Manufacturer's representative.** "Manufacturer's representative" means a business that has a written agreement or agreements with one or more manufacturers or manufacturer's authorized distributors to sell the products of the manufacturer, but that is not an employee of the manufacturer.

Subp. 16. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions which allows a bidder a substantial advantage or benefit not enjoyed by all

other bidders.

Subp. 17. **Person.** "Person" means a natural person or a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates.

Subp. 19. **Reinstatement.** "Reinstatement" means a debarred vendor may seek restoration to state bidders' lists one year from the date of debarment by submitting application to the commissioner through the Material Management Review Board. If restored, the vendor will be subject to a one year probationary period.

Subp. 20. **Responsible bidder.** "Responsible bidder" means a bidder who:

A. is not a broker of, but rather is a manufacturer of, regular dealer in, or the agent of a manufacturer with full knowledge of supplies to be furnished; or

B. if services are to be provided, has the necessary skills or is in the business of supplying these services; and

C. can demonstrate a satisfactory credit standing, lack of tax liability, and the financial capability to perform the contract as evidenced by the ability to obtain bonding when required; and

D. has no record of failure to perform or of unsatisfactory performance of contracts for the state or other customers and is not currently debarred by another government entity for any cause including defaults on contracts, late deliveries, products not meeting specifications, substandard installation, or service; and

E. is otherwise qualified under rule and law, including incorporation in or registration to do business in Minnesota; and

F. has not engaged in unlawful practices, associated with organized crime, operated under false names or fronts as small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G under part 1230.1500, subpart 20.

Subp. 21. **SIC or Standard Industrial Classification.** "SIC" or "Standard Industrial Classification" was developed for use in the classification of business establishments by type of activity, for the purpose of facilitating the collection, tabulation, presentation, and analysis of data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations, for promoting uniformity and comparability in the presentation of statistical data relating to those establishments and their fields of endeavor.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended from consideration for award of contracts by the director of Materials Management while the director determines if there is probable cause for debarment. The suspension shall not be for a period exceeding six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means those certified businesses designated by the commissioner of administration that are majority owned and operated by women, persons with disabilities, or specific minorities and provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially disadvantaged persons.** "Racial minority," "women," and "persons who have suffered a substantial physical disability" shall have the following meanings.

A. "Racial minority" means all persons in one or more of the following categories:

(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.

(2) "Hispanic" means all persons of Mexican,

Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands. This area includes China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.

(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.

(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the governments of the United States and Canada.

B. "Women" means all persons of the female gender.

C. "Persons who have suffered a substantial physical disability" means all persons with a physical impairment that is likely to cause difficulty in securing, retaining, or advancing in employment, and that substantially limits one or more of his or her major life activities.

Subp. 25. **Third-party lessor.** "Third-party lessor" means a business that as a lessee acts as a lessor to a third party.

Subp. 26. **Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business.** "Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" means a small business entity with its principal place of business in Minnesota organized for profit, including any individual, partnership, corporation, joint venture, association, or cooperative, which entity is 51 percent owned and operated on a day-to-day basis by citizens of the United States of America.

1230.1600 ELIGIBILITY FOR SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Subpart 1. **Eligible businesses.** The following businesses

are eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: manufacturer, manufacturer's representative, dealer, jobber, distributor, contractor, and businesses engaged in a joint venture.

Subp. 2. **Ineligible businesses.** The following businesses are not eligible for participation in the socially disadvantaged or economically disadvantaged area small business program: brokers, third-party lessors, and franchises.

Subp. 3. **Revenue or sales limitations; Minnesota Small Business Program.** For the purpose of identifying businesses eligible to participate in the Minnesota Small Business Program, the preference and set-aside programs for targeted group small businesses; or for small businesses located in economically disadvantaged areas, the qualifying parameter shall be expressed in terms of gross annual revenues or sales as an upper limitation; i.e. "not to exceed." In no case shall the limitation for any category of business enterprise be set at less than $1,000,000.

A. Standard industrial classification (SIC) codes shall be used in classifying limitations among the variety of businesses potentially eligible for participation in the Minnesota Small Business Program.

B. Limitations, standards, shall be set for each major, two-digit, SIC group based on the following procedure:

(1) Typical financial balance sheet information compiled in annual reports such as the Robert Morris and Associates annual statement studies, Dun and Bradstreet, or similar reporting services will be used to establish the range of annual revenues or sales for a given major group class. This range shall, wherever the data is available, reflect an average of at least three consecutive reporting years, but shall not exceed five years.

(2) The upper limitation defining small business based on annual gross revenues or sales is determined by establishing a representative annual market consisting of the

total gross revenues or sales generated by the reporting sample class. The lower quartile, 25 percent, of this market shall represent the small business category.

(3) The average gross revenues of the number of firms it requires to equal the total lower quartile market shall be the upper limit, defined in gross annual revenues or sales, permitted for definition of a small business in Minnesota.

(4) Where the three-digit SIC code data treated in subitems (1) to (3), varies significantly from the two-digit aggregated data or the four-digit data varies significantly from the two- or three-digit classes, a specific limitation shall be established for that three- or four-digit class.

(a) Significant variation for differences between two- and three-digit codes shall be five percent above or below the two-digit standard for gross annual revenue or sales.

(b) Significant variation for differences between three- and four-digit codes shall be five percent, or ten percent above or below the two-digit standard.

(5) After the initial establishment of limitations according to the process described for definition as a small business in Minnesota, for the purposes of this program, the Department of Administration shall in year two of the rule begin a process of reexamining on an annual basis one-third of the groups for appropriate limitations and redefinition where justified.

1230.1700 CERTIFICATION OF ELIGIBILITY.

Subpart 1. **Required information.** To qualify for the preference programs established by Minnesota Statutes, section 16B.19, subdivisions 2a to 2d, each business shall file with the Materials Management Division the following information on the application forms provided:

A. the name and address of the applicant and the principal place of business;

B. which type of designation as a small business,

socially disadvantaged small business or economically disadvantaged area small business, is being applied for:

(1) socially disadvantaged small businesses are those businesses defined by Minnesota Department of Administration, part 1230.1550, subpart 24; or

(2) an individual business which is not a targeted group business but is owned by a socially disadvantaged person, as defined in part 1230.1550, subpart 24, that is encountering the effects of discrimination as evidenced by the owner lacking adequate external support necessary to operate a competitive business enterprise through a diminished ability to secure:

(a) long-term or working capital financing;

(b) equipment, raw material, or supplier trade credit;

(c) bonding and insurance; or

(d) a proportionate share of the market for its goods and services; or

(3) the small business is located in an economically disadvantaged area as defined in Minnesota Statutes, section 16B.19, subdivision 2d, and/or

(a) the owner resides or is employed in an area designated a labor surplus area by the United States Department of Labor;

(b) the owner resides or is employed in a county in which the median income for married couples is less than 70 percent of the state median income for married couples;

(c) the business is a rehabilitation facility or a work activity program as certified by the Department of Jobs and Training; or

(d) the small business owner resides or is employed in an area designated by the commissioner as an economically disadvantaged area under Minnesota Statutes, section 16B.19, subdivision 2d;

C. an indication of the type of business operated and the kinds of service, materials, or supplies which can be

delivered;

D. a listing of all owners, including percentage of ownership, method of acquisition, ownership in other firms, and copies of the following documents:

(1) complete financial statements for the business for each of the preceding three fiscal years, or since the inception of the business if established less than three years;

(2) a profile of the owners' management responsibilities and a description of the management responsibilities assigned to other individuals, including a chronological resume for each owner, officer, and other key personnel;

(3) a statement indicating whether or not the business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises which are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) proof of ownership of business. Owners shall submit proof of their ownership of the requisite percentage of the business at the time the application is submitted, and the proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, a canceled check used to purchase ownership, or other recognized proof of ownership.

(a) In the case of a sole proprietorship or where documentary proof of ownership is not available, the owner shall clearly state the reasons for such and be prepared to assist the division in further investigation of proof.

(b) If requested, the owners must show how and when the interest in the business was acquired.

(c) The division may require additional proof or information necessary to verify ownership.

E. In addition, for certification under item B, subitem (2), unit (a), (b), (c), or (d), the following information must be provided for the most recent fiscal year and the preceding four years, if the applicant has operated as a business for four years, identifying the fiscal year reporting system used by the applicant and listing in whole dollar amounts:

(1) assets:

(a) cash and equivalent: all cash, marketplace securities, and other near-cash items, excluding sinking funds;

(b) trade receivables (net): all accounts from trade, less allowance for doubtful accounts;

(c) inventory: anything constituting inventory for the business;

(d) all other current: any other current assets, not including prepaid items;

(e) total current: the total of all current assets shown in subitems (a) to (d);

(f) fixed assets (net): all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;

(g) intangibles (net): intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;

(h) all other noncurrent: prepaid items and any other noncurrent assets;

(i) total: total of all items listed above.

(2) liabilities:

(a) notes payable (short-term debt): all short-term note obligations, including bank and commercial paper excluding trade notes payable;

(b) current maturities (long-term debt): that portion of long-term obligations that is due within the next fiscal year;

(c) trade payables: open accounts due to

the trade;

(d) income taxes payable: income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;

(e) all other current: all other current liabilities, including bank overdrafts and accrued expenses;

(f) total current: total of all current liabilities listed above;

(g) long-term debt: all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;

(h) deferred taxes: all deferred taxes. Identify federal, state, and local taxes in subtotals;

(i) all other noncurrent: any other noncurrent liabilities, including subordinated debt and liability reserves;

(j) net worth: difference between total liabilities and total assets, including minority interest;

(k) total liabilities and net worth: total of all items listed above.

(3) income data:

(a) net sales: gross sales less returns and discounts allowed, if any;

(b) gross profit: net sales less cost of sales;

(c) operating expenses: all selling, general, and administrative expenses, including depreciation, excluding interest expense;

(d) operating profit: gross profit less operating expenses;

(e) all other expenses (net): includes miscellaneous other income less expenses, such as interest expense, miscellaneous expenses not included in general and administrative expenses netted against recoveries, interest income, dividends received, and miscellaneous income;

(f) profit before taxes: operating profit

minus all other expenses (net).

F. If the business seeking certification is a contractor, the information in item E must be submitted in all categories except as modified in the following:

(1) assets:

(a) accounts receivable - progress billings: amounts billed on current contracts excluding retention;

(b) accounts receivable - current retention: amounts held back by customers on current contracts as retention;

(c) inventory: costs attributable to equipment, small tools, supplies, and other deferred costs related to contracts in progress where a portion of the cost applies to work not yet performed;

(d) costs and estimated earnings in excess of billings: the difference between the total of costs and recognized estimated earnings to date and the total billings to date;

(e) total current: total of all current assets shown and as modified, changed, or added in the above definitions;

(f) joint ventures and investments: the total of investments and equity in joint ventures.

(2) liabilities:

(a) accounts payable - trade: open accounts and not obligations due to the trade;

(b) accounts payable - retention: amounts held back as retention in payments to subcontractors on current contracts;

(c) billings in excess of costs and estimated earnings: the difference between the total billings to date and the total of costs and recognized estimated earnings to date;

(d) total current: total of all current liabilities shown and as modified, changed or added in the above

definition;

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in the above definitions.

(3) income data:

(a) contract revenues: revenues recognized under percent of completion method (in place of net sales).

G. In separate schedules, all applicants applying under item E or F should show the amounts attributable to depreciation, depletion, amortization, interest income, interest expenses, officers' compensation, and miscellaneous income shown as passive or nonpassive income. A schedule of leased assets with a brief description of type and dollar value must be submitted. A brief outline describing shareholders equity must be submitted, when applicable, for the type of company organization.

In addition, supportive documentation must be submitted when seeking certification under various provisions as follows:

(1) item B, subitem (2), unit (a): for certification as lacking adequate external support in obtaining long-term or working capital financing, any documentation showing denial of loans or offers of loans at terms and rates not currently normal for similar enterprises;

(2) item B, subitem (2), unit (b): for certification as lacking external support in obtaining equipment, raw materials, or supplier trade credit, any documentation showing denial of credit or credit extended at terms, conditions, and rates in excess of the norm expected within similar enterprises;

(3) item B, subitem (2), unit (c): for certification as lacking adequate external support in obtaining bonding and insurance, any documentation showing inability to obtain bonding or insurance at rates and terms normally expected within the industry segment of the applicant.

(4) In all cases, adequacy of documentation, accuracy of financial data, and development of argument and

positions with regard to an applicant's lack of external support within any of the four categories of item B, subitem (2), unit (a), (b), (c), or (d), rests with the applicant and must be submitted in writing with the application for certification. The division retains the right of inquiry and verification of all information submitted.

H. When seeking certification under any provision of item B, subitem (1), (2), or (3), or any other certification provision, the applicant shall provide all other relevant or supporting information requested by the division.

I. Denials of certification under these provisions are subject to appeal under subpart 7.

Subp. 2. and 3. [See Repealer.]

Subp. 4. **Notice of changes.** The director of the division shall be notified in writing of any change in the application or attached information within 30 days of the changes.

Subp. 5. **Grounds for rejecting application.** An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the application form and all supporting documents required by the division. An application shall be rejected on any of the following grounds:

A. the applicant is dominant in its field of operation or is an affiliate or subsidiary of a business dominant in its field of operation;

B. the applicant has failed to provide all relevant required information;

C. the applicant failed to establish that majority ownership and day-to-day operating control are held by socially disadvantaged small business or economically disadvantaged area small business person(s);

D. the applicant has failed to comply with laws and rules of the state relating to procurement;

E. the applicant has intentionally or negligently falsified application information;

F. the applicant is a broker and/or third-party lessor or operates as a franchiser or franchisee;

G. the applicant's principal place of business is not in Minnesota;

H. ownership of the applicant's business is shared with a previously certified participant who was removed from the bid eligibility list or directory of certified businesses by operation of Minnesota Statutes, section 16B.22, clause (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item I, subitem (2), unit (a), when applying as an individual business under subpart 1, item B, subitem (2).

Subp. 5a. **Criteria for determinations.** The following standards shall be used in determining whether, under subpart 5, item C, a firm is owned and operated on a day-to-day basis by one or more socially or economically disadvantaged persons:

A. The individual's claim, supported by sufficient documentation, that he or she is a socially disadvantaged small business person or an economically disadvantaged area small business person as defined in these rules.

B. The ownership and day-to-day operation of a socially disadvantaged small business or economically disadvantaged area small business must be real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents. The socially disadvantaged or economically disadvantaged small business owners must have the customary incidents of business ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than form of the business arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient. The division shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial arrangements, equipment rental or leasing agreements, and relationships with nontargeted businesses that vary from

accepted industry practice.

C. The socially disadvantaged or economically disadvantaged area business owner must possess the power to direct the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operation. The firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially or economically disadvantaged owners. There must be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially or economically disadvantaged business owners from making a business decision for the firm without the cooperation or vote of any owner who is not a socially or economically disadvantaged person.

D. If the owners of the firm who are not socially or economically disadvantaged persons are disproportionately responsible for the operation of the firm, then the firm will not be considered to be owned and operated by socially or economically disadvantaged persons.

E. All securities that constitute ownership or control or both ownership and control of a corporation must be held directly by socially or economically disadvantaged persons. No securities held in trust or by any guardian for a minor will be considered as held by socially or economically disadvantaged persons in determining the ownership or control of a corporation.

F. The contributions of capital or expertise by the socially or economically disadvantaged owners to acquire their interests in the firm must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or participation as an employee only, rather than as a manager.

G. In addition to the standards in items A to F, the following circumstances will be given special consideration in

determining eligibility:

(1) newly formed firms and firms whose ownership or day-to-day operating control or both ownership and control has changed will be closely scrutinized to determine the reasons for the timing of the formation or of a change in the firm;

(2) a previous or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities referred to in subpart 5 and this subpart;

(3) any relationship between a socially disadvantaged or economically disadvantaged area business and a business that is not a socially disadvantaged or economically disadvantaged area business that has an interest in the socially disadvantaged or economically disadvantaged area business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

H. The combined gross sales or revenues from businesses operated by the same owners in related fields exceed the highest size standard for the field defined under part 1230.1600, subpart 3.

I. The following standards, along with supporting documentation, shall be used in reaching a determination to certify an applicant under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d):

(1) Financial data for the company seeking certification shall be analyzed using formulas, techniques, processes, and ratios used in the annual statement studies published by Robert Morris and Associates (RMA), Philadelphia. Where RMA data does not reflect or provide adequate comparable data for the applicant's main line of business, the "Industry Norms and Key Business Ratios," published by Dun and Bradstreet Credit Services, or any similar representative reporting service may be used.

(2) Certification determination will be made upon careful review of all the evidence submitted. However, to

establish eligibility for this review, the financial data applicable to the applicant company shall fall within the following parameters:

(a) financial ratios: at any point between the lower quartile and the upper quartile. Upper quartile ratings are indicative of a successful company not in need of the assistance provided through certification. Lower quartile ratings indicate a need for additional assistance before certification. Lower quartile businesses will be referred to the Department of Trade and Economic Development for remedial assistance before becoming eligible for reconsideration for certification.

(3) The following ratios and formulas will be used to determine eligibility for certification:

(a) lacking adequate external support in obtaining long-term or working capital financing: earnings before interest and taxes (EBIT)/interest, sales/working capital, quick ratio, fixed/worth, debt/worth;

(b) lacking adequate external support in obtaining equipment, raw materials, or supplier trade credit: current ratio, quick ratio;

(c) bonding and insurance: none - review of documentation only;

(d) the business has not captured a proportionate share of the market for its goods and services, based on the most current annual statement studies published by RMA. The national average revenues appropriate for the applicant business's standard industrial code and asset size will be divided by the national average assets determined similarly and multiplied by the applicant's actual total assets to indicate a proportionate market share. The applicant business's actual revenues will be divided by this proportionate market share to indicate the actual percentage of the proportionate market attained. Any percentage at 75 or less shall qualify for eligibility.

(4) If eligible under subpart 1, item B, subitem

(2), unit (a), (b), (c), or (d), all other documentation shall be reviewed to arrive at a determination to grant or deny certification. The key determinant is "lacking adequate external support...as evidenced by diminished ability to secure..." Even though an applicant qualifies as an eligible business on the basis of financial ratios, if the business has been able to secure sufficient loans, bonding, insurance, or credit at the usual industry norms, it is not qualified as there is no evidence showing lack of support. Conversely, the business may show adequate financial ratios but still find itself unable to obtain any, or only partial, amounts of financing, bonding, credit, or insurance needed to remain competitive, or it can only acquire such at unfavorable terms not normal for its industry segment. Upon finding that such circumstances are not a result of internal management deficiencies as indicated by ratios appropriate to these concerns such as the following:

(a) percent profit before taxes/tangible net worth;

(b) percent profit before taxes/total assets;

(c) percent depreciation, depletion, amortization/sales; and

(d) percent officers' compensation/sales;

the business can be certified as a targeted group business. The same management efficiency review shall apply when determining certification due to an inability to capture a proportionate market share; however, no other documentation will need be considered under this eligibility criterion. Findings that a business suffers from internal management deficiencies will require a denial of certification until remedial assistance has been obtained through referral to the Department of Trade and Economic Development for help from public or private resources. When the appropriate ratio indicators fall within the eligible zone, the business may again apply for certification.

The impact of both short- and long-term business cycles for

the economy in general and for the particular business segment in specific shall be considered in arriving at certification findings. When appropriate, an average of two to five years of fiscal data for the applicant company shall be used in determining ratio values.

(5) Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines shall be reviewed for certification under those distinctions. If the company operates in more than one SIC classification, the review shall be made under the primary industry segment if 75 percent or more of its net sales or contract revenues are generated by that segment. The business may seek certification for individual product, service, commodity, or construction activities if 25 percent or more of its net sales or contract revenues is generated by a given category. All other financial data required by this application process must be proportionately attributed to the categories for which certification is sought unless it can be conclusively demonstrated that the dollar amounts shown are directly attributable to specific elements. If the company is unable to provide the breakdown of financial data requested by this rule, it must accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of rejection of application.** After an applicant has received written notice of rejection of the application for certification as a socially disadvantaged small business or economically disadvantaged area small business, the applicant may appeal the decision in writing to the commissioner of administration within 15 calendar days of receipt of the determination. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if feasible, refer the appeal to the Small Business Procurement Advisory Council for its recommendation before

reaching a final decision. The commissioner shall make a final decision in writing within 45 calendar days of receipt of the appeal.

1230.1800 PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A directory of eligible businesses, certified pursuant to part 1230.1700 shall be established and maintained by the division for various commodity classes.

1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES.

The division shall attempt to achieve utilization of socially disadvantaged small businesses in proportion to their representation in the market. In so doing, the division may use either of the following purchasing methods for awarding requisitions to those socially disadvantaged businesses designated by the commissioner as targeted group businesses.

A. When it is likely that three competitive bids will be obtained from certified targeted group small businesses, the requisition may be set aside for bidding only by those businesses.

(1) The division shall include a statement on the invitation to bid informing all vendors that the bid is set aside for bidding only by certified targeted group small businesses.

(2) The division shall reject any bid by a business not certified as a targeted group small business.

(3) Where there are no bids or no acceptable bids, unsatisfactory bids, if any, will be recorded and the requisition shall be rebid.

B. A certified targeted group small business may be awarded up to a six percent preference in the amount bid over the lowest responsible bid from another vendor.

(1) The division shall include a statement on the invitation to bid informing all vendors that certified targeted group vendors will receive a preference in the amount bid and

the amount of the preference to be awarded.

(2) When the lowest acceptable bid from a certified targeted group small business is within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified targeted group small business.

(3) When there is no acceptable bid from a certified targeted group small business within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING, OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction, consulting, or professional or technical services to targeted group small businesses.

A. Goals for subcontracting may be independently set for each contract and may vary from contract to contract, depending on the type of work involved and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers from the normal subcontracting goals according to the following procedure:

A. The invitation to bid or request for proposals may as one of the conditions of contract waive subcontracting

requirements for all or specific specialties based on the division's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

B. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof shall accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

C. After the award and the commencement of the project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Bid documents will state whether or not the incentive rule applies for the project being bid. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at $50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25 percent. Contracts between $2,000 and $50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500 in potential subcontracting awards.

(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or $60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

(a) subtract the established goal plus three percent from 25 percent;

(b) divide six percent of the project or $60,000, as appropriate, by the number of percentage points in unit (a); and

(c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed $60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the Materials Management Review Board. The board may uphold, modify, or reject the penalty. The decision of the board may be appealed within 30 calendar days to the commissioner. If there are facts in dispute, the commissioner may refer the matter to the Office

of Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, or, if feasible, may affirm or reject the board's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000, added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the underuse determined in the bid proposal as compared to the announced project goal.

D. The division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A certified economically disadvantaged small business may be awarded up to a four percent preference in the amount bid over the lowest responsible bid from another vendor.

A. The division shall include a statement on the invitation to bid informing all vendors that certified economically disadvantaged vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

B. When the lowest acceptable bid from a certified economically disadvantaged small business is within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified economically disadvantaged small business.

C. When there is no acceptable bid from a certified economically disadvantaged small business within four percent of the lowest acceptable bid from another vendor, award shall be

made to the lowest responsible vendor.

D. When the division awards both a preference to a certified targeted group small business and a preference to a certified economically disadvantaged small business on the same requisition, the lowest acceptable bid shall be determined by deducting the preference percent awarded from the acceptable bid by the certified small business.

1230.1850 REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES.

Subpart 1. **Removal for failure to fulfill contract.** A business shall be removed from the bid eligibility lists and shall be ineligible to be awarded contracts when it fails to satisfactorily fulfill the terms and conditions of a contract. Removal or debarment by other governmental entities shall automatically result in removal from these bid eligibility lists as well. Notice of removal from bidding lists and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under this subpart may apply for reinstatement and participation in the preference program and may be listed if the division determines that the business is able to undertake and satisfactorily complete future contracts. As part of the reinstatement evaluation process, the division may require the applicant to provide in writing:

A. an explanation of the steps taken by the applicant to resolve the production, financial, or technical problems that caused its previous failure to perform; or

B. evidence of successful completion of at least four other contracts, including contracts with two public entities, in the same commodity class, field, or type of work in which the applicant seeks to bid or completion of the requirements for reinstatement and probation.

Subp. 3. **Removal from certified directory when a business**

no longer qualifies. A business shall be removed from the certified directory and will no longer be eligible for bidding on any set-aside or preference contract when the business no longer qualifies for these preference program under Minnesota Statutes, section 16B.22, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business. When removal is for loss of status as an economically disadvantaged area, the business shall remain eligible for 120 days after certified small businesses in the area are notified of the termination of the status by the division.

Subp. 4. **Appeal of removal.** When a business is removed from the bid lists and disqualified from further bidding under subpart 1, 2, or 3 or is removed from the certified directory, the business may appeal the removal and disqualification to the commissioner of administration in writing within 15 calendar days of the receipt of the notice of removal. Receipt of the appeal shall be acknowledged by the commissioner in writing within 15 calendar days of receipt. The commissioner shall request that the business choose either an informal review of the disqualification under item A or a formal review under item B if facts of the matter are in dispute.

A. Under an informal review process, the Small Business Procurement Advisory Council shall consider whether the decision to remove a business from the bid list or certified directory was reasonable and whether the removal is in compliance with subpart 1 or 2. The council will review the facts presented by the business and the division. Within 45 calendar days of the council's receipt of a request for review, the council shall recommend that the commissioner take one of the following actions:

(1) reinstate the business on the bid lists or certified directory;

(2) affirm the removal of the business; or

(3) refer the matter to the Office of

Administrative Hearings for a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62.

The council's recommendation to the commissioner shall be in writing and include the reasons for its decision. The commissioner shall consider the recommendation and make a final decision on the matter within 15 calendar days of receiving the council's recommendation. The commissioner shall include written reasons for the decision.

B. Within 30 calendar days after a request by the business or the council for formal review, the commissioner will initiate a contested case hearing under Minnesota Statutes, sections 14.57 to 14.62, by filing a request for assignment of an administrative law judge with a notice of an order for hearing. When the commissioner receives the report of the administrative law judge, the commissioner shall forward the report to the Small Business Procurement Advisory Council for its review, and the council shall, within 45 days, make its recommendation. The commissioner shall make a final decision on each appeal.

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

To ensure equitable distribution of awards and reduce the dependency of any given business on state awards for a major part of its annual revenues, the following limitations apply:

A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these program to that business exceed three-tenths of one percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute, the Department of Administration, the Department of Transportation, and the University of Minnesota.

B. Eligibility for set-aside or preference for a specific business shall be terminated when the annual review of

financial statements or the cumulative record of awards compiled by the division from reports submitted by agencies covered under the statute indicate that any of the following conditions exist:

(1) more than an average of 80 percent of the business's gross revenues or sales are attained through preference or set-aside awards during the second and third years of participation in the program;

(2) for years four and five, the limitation average shall be 50 percent of gross annual revenues or sales;

(3) for years six and beyond, the limit shall not exceed 40 percent.

There will be no limit on awards acquired through the normal competitive bid process at any time.

C. No business shall be permitted to participate in the preference and set-aside programs indefinitely. A business will not be certified but will graduate from the preference and set-aside programs when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

(2) demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area; or

(3) the business has captured a proportionate share in its market for assets employed, by the following averages:

(a) 200 percent in year one;

(b) 175 percent in years one and two;

(c) 150 percent in years one, two, and three;

(d) 125 percent in years two, three, and four;

(e) 125 percent in years three, four, and

five, or any three consecutive years thereafter.

1230.1900 GENERAL TERMS AND CONDITIONS.

Subpart 1. **Inability to perform.** An eligible business that finds it cannot produce, supply, or construct according to the bid terms and conditions of a contract for reasons beyond its control shall immediately notify the division in writing of the reasons therefor. When the commissioner determines that the business is unable to perform for the reasons stated, the division shall notify the Department of Trade and Economic Development so that the commissioner of trade and economic development can assist the small business in attempting to remedy the causes of the inability to perform. The division shall notify the business of the referral to the Department of Trade and Economic Development and the notice shall include a statement that any records of the Department of Trade and Economic Development in assisting the small business may be discoverable in a contested case or judicial procedure. Failure to enter into a contract, to accept an offered award, or to satisfactorily complete a contract for documented reasons beyond its control will not automatically disqualify a business from further bidding.

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business's inability to perform. If the division decides that delay is inappropriate because of the nature of the bid or contract, the division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

B. Failure of the business in question to reasonably cooperate with either the division or the Department of Trade and Economic Development shall be considered a failure to fulfill the terms of a contract and shall be handled according to part 1230.1850, subpart 1. The records of the division shall

document the actions taken relative to each case of inability to perform handled under this subpart.

Subp. 2. to 4. [See Repealer.]

Subp. 5. **Dividing bid invitations.** The director of the division shall divide bid invitations by dollar amounts, units of production, or duration of contract to facilitate awarding set-aside or preference contracts wherever the division is considered feasible.

Subp. 6. [See Repealer.]

Subp. 7. **Annual reporting requirement.** The following reporting requirements apply to the socially disadvantaged or economically disadvantaged area small business programs:

A. Businesses eligible to participate in these programs shall, within 30 calendar days of a request by the division, verify information on file with the division for that business, make any necessary changes, and submit a complete financial statement to the division. The information on file with the division will include:

(1) the name and address of the applicant and its principal place of business;

(2) the applicant's gross revenues in the most recently completed fiscal year;

(3) whether the applicant's business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) a listing of all owners, including percentage of ownership, and all officers of the applicant, with full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises that are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) all other relevant or supporting information necessary for verifying status resulting in eligibility under certification procedures if requested in writing by the division, before or after the annual reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the certified directory.

1230.1910 CONSULTANT, PROFESSIONAL, AND TECHNICAL PROCUREMENTS.

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of consultant, professional, and technical procurements under Minnesota Statutes, section 16B.19, subdivision 2.

Subp. 2. **Awards.** Division certification is not required for individuals who provide consultant, professional, or technical services and who are not organized as a business, corporation, partnership, proprietorship, or other recognized business structure. An individual person may be awarded contracts under Minnesota Statutes, section 16B.19, subdivision 2, provided that the contracting agency maintains records stating that the individual meets the terms governing socially or economically disadvantaged area persons established in part 1230.1500, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.1700, subparts 2 and 3; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300 are repealed.

EFFECT OF EMERGENCY AMENDMENTS. After the emergency amendments expire as provided in Minnesota Statutes, section 14.35, the permanent rules as they read prior to those amendments shall again be in effect, except as they may be subsequently amended, and all rules that were repealed in these rules shall be revived.

SF-00006-05 (4/86)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT : of Administration

DATE : September 6, 1990

TO : Patti Nolte, Legal Assistant
Office of the Attorney General

FROM : Dorothy Lovejoy, Manager
Customer & Vendor Services

PHONE : 296-8489

SUBJECT : Emergency Rules Relating to the Small Business Procurement Program

The following documents are enclosed in support of our need to adopt emergency rules to implement the provisions of Minnesota Statutes 16B.189 through 16B.22 as amended by Chapter No. 541 1990 legislative session:

1. Notice of solicitation of outside information or opinions; photocopy (1)
2. Petition to adopt, suspend,amend or repeal: (none received); not required
3. Authorizing resolution; not applicable
4. Copy of proposed emergency rule and approval as to form from revisor; copy (1)
5. Notice of intent to adopt... as mailed; (no requests) not applicable
6. Affidavit of mailing; (no requests) not applicable
7. Notice of intent to adopt emergency rule as published in State Register; photocopy (1)
8. Copies of the emergency rule as adopted (provided by revisor) copies (4)
9. Certificate of resolution; not applicable
10. Findings of fact, conclusions, and adopting order; original (1)
11. Written requests, submissions, comments; (notice of solicitation) (10), (notice of intent to adopt) none received
12. Notice of submission to Attorney General; (not applicable) none received
13. Affidavit of mailing the notice of submission; (not applicable)

RECEIVED

SEP 10 1990

Office of the Attorney General
Government Services Section
Capitol Office Bldg., Suite 500
525 Park Street
St. Paul, MN 55103

Stat Auth.
16B.22
The commissioner shall adopt by rule additional standards and procedures for certifying that . . . .

Chapter 541 Subd 30
The commissioner may adopt emergency rules for purposes of implementing sections 3 to 9.

Signed by the governor
May 3, 1990

Stated in findings people have until August 24 to comment

Proposed Rules p. 24 lines 5 and 6 ~~of~~ feasible should be defined or criteria should be set up

Rules page numbers

p. 23 13, 14
P. 26 lines 17, 18 decision may set goals = when do they set goals how do they decide to set goals

Page 27 lines 3 and 4
The invitation to bid may ... as 1 of the conditions ... why? when?
I guess they do explain it

a certified target group small business may be awarded up to 6% (page 25)

a certified economically disadvantaged small business may be awarded up to 4% preference p. 27

There should be a penalty for companies that submit false information in order to try to qualify. There are alot of non minority companies that have been able to qualify but aren't really a minority.

NOTICE OF INTENT TO ADOPT EMERGENCY RULE.

DEPARTMENT OF ADMINISTRATION

IN THE MATTER OF THE PROPOSED ADOPTION OF EMERGENCY RULE OF THE STATE OF MINNESOTA GOVERNING THE SMALL BUSINESS PROCUREMENT PROGRAM.

NOTICE OF INTENT TO ADOPT AN EMERGENCY RULE

(1) Notice is hereby given that the State of Minnesota, Department of Administration intends to adopt the above entitled emergency rule. The statutory authority to adopt the rule is contained in Minnesota Statutes Section 16B.189 to 16B.22 as amended by Chapter No. 541, H.F. No. 2230, 1990, Section 30. The agency in adopting the rule, is following the procedures set forth in the Administrative Procedure Act for adopting emergency rules in Minnesota Statutes, sections 14.29 to 14.36.

(2) All persons have 25 days after publication to submit data and views on the proposed emergency rule or any part or subpart of the rule in writing. (3) Any comments must be submitted to:

Robert J. Baldwin
Department of Administration
Materials Management Division, Room #112
50 Sherburne Avenue
St. Paul, Minnesota 55155

(4) A copy of the proposed rule is attached to this notice.

(5) A free copy of the proposed emergency rule is available by contacting the Materials Management Division Helpline (612) 296-2600.

(6) The proposed emergency rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed emergency rule as noticed.

(7) Upon adoption of the emergency rule by the agency, the emergency rule as adopted and its supporting documents will be delivered to the Attorney General for review as to legality and form to the extent form relates to legality. Any person may request notification of the date of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the adoptive rule, must submit this written request to Robert J. Baldwin at the address specified above.

(8) The emergency rule will take effect five working days after approval by the Attorney General and be effective for 180 days. The emergency rule will be continued in effect for an additional 180 days if the agency gives notice of continuation in accordance with Minnesota Statute, section 14.35.

Sandra J. Hale

July 23, 1990

Sandra J. Hale

Commissioner of Administration

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Emergency Rule Amendments Relating to the Small Business Procurement Program	FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING EMERGENCY RULE

(1) Notice of the Commissioner of Administration's intent to adopt the above-entitled emergency rule was published in the State Register on July 30, 1990. There was no mailing of the notice of intent because the Department of Administration does not have a rulemaking mailing list and no one has registered or requested to be on the agency's rulemaking list pursuant to Minnesota Statutes, Section 14.14, Subdivision 1a.

(2) All persons were given an opportunity to submit comments for a period of 25 days ending August 24, 1990. (4) Although comments were received during the period after the notice to solicit outside opinions was published, no comments were received during the 25-day comment period. No requests were received to be notified of submission of the adopted emergency rule to the Attorney General.

(3) No changes were made from the proposed rule to the adopted rule.

(5) NOW, THEREFORE, IT IS ORDERED that the rule identified as emergency rules relating to the Small Business Procurement Program is adopted this 7th day of September, 1990, pursuant to the authority vested in me by Laws of 1990, Chapter 541, Section 30.

Sandra J. Hale
Commissioner of Administration

(c) Vehicle Restrictions.

(1) Off-road vehicles such as trail-bikes, motor bikes, all-terrain vehicles and snowmobiles shall not be permitted in Camp Ripley during the hunting season established by this order. All other vehicles are restricted to operating only on designated roads.

(2) Vehicles in line overnight at the checkpoint must be occupied. Hunters must stay with their vehicles.

(3) Maximum speed limit on roads in the hunting areas is 35 mph or as otherwise posted.

(d) Tree Stands.

(1) No permanent tree stands shall be erected. Portable stands shall not be left up overnight.

(2) No licensed hunter shall occupy any elevated deer stand from sunset to one hour before sunrise.

(e) Other Restrictions.

(1) No fires are permitted anywhere in the hunting areas, except in emergencies.

(2) No person shall destroy or remove any Camp Ripley property.

(3) No deer shall be removed from Camp Ripley or be transported beyond the DNR checkpoint until registered at the checkpoint.

(4) The Commissioner may close the season without prior notice for any reason deemed necessary.

(5) No wild animals other than deer, porcupines, and coyotes as permitted by this order shall be taken in Camp Ripley at any time.

(6) Except as specifically authorized none of the provisions of this order shall be construed as modifying or superseding any order establishing game refuges within the state nor as permitting the taking of any wild animals within such refuges or within state parks.

Dated at Saint Paul, Minnesota this 9th day of July, 1990.

Joseph N. Alexander, Commissioner
Department of Natural Resources

Emergency Rules

Proposed Emergency Rules

According to Minn. Stat. of 1984, §§14.29-14.30, state agencies may propose adoption of emergency rules if: 1) expressly required; 2) authorized by statute; or 3) if the manner permitted by a directive (given by statute, federal law or court order) does not allow for compliance with sections 14.14-14.28. The agency must, however, publish a notice of intent to adopt emergency rules, along with the rules themselves, in the *State Register*. The notice must advise the public:

1) that a free copy of the proposed emergency rule is available upon request from the agency;
2) that notice of the date that the rule is submitted to the attorney general will be mailed to persons requesting notification;
3) that the public has at least 25 days after publication of the proposed emergency rule to submit data and views in writing; and
4) that the emergency rule may be modified if the data and views submitted support such modification.

Adopted Emergency Rules

Emergency rules take effect five working days after approval by the attorney general, and after compliance with Minn. Stat. §§14.29-14.365. As soon as possible, emergency rules are published in the *State Register* in the manner provided for in section 14.18.

Emergency rules are effective for the period stated in the notice of intent to adopt emergency rules. This may not exceed 180 days.

Continued/Extended Emergency Rules

Adopted emergency rules may be continued in effect (extended) for an additional 180 days. To do this, the agency must give notice by: 1) publishing notice in the *State Register*: and 2) mailing the same notice to all persons who requested notification on rulemaking. No emergency rule may remain in effect 361 days after its original effective date. At that point, permanent rules adopted according to Minn. Stat. 14.14-14.28 supercede emergency rules.

Department of Administration

Proposed Emergency Amendments to Permanent Rules Relating to the Small Business Procurement Program

Notice of Intent to Adopt an Emergency Rule

NOTICE IS HEREBY GIVEN that the State of Minnesota, Department of Administration intends to adopt the above entitled

emergency rule. The statutory authority to adopt the rule is contained in *Minnesota Statutes* Section 16B.189 to 16B.22 as amended by Chapter No. 541, H.F. No. 2230, 1990, Section 30. The agency in adopting the rule, is following the procedures set forth in the Administrative Procedure Act for adopting emergency rules in *Minnesota Statutes*, sections 14.29 to 14.36.

All persons have 25 days after publication to submit data and views on the proposed emergency rule or any part or subpart of the rule in writing. Any comments must be submitted to:

Robert J. Baldwin
Department of Administration
Materials Management Division, Room #112
50 Sherburne Avenue
St. Paul, Minnesota 55155

A copy of the proposed rule is attached to this notice.

A free copy of the proposed emergency rule is available by contacting the Materials Management Division Helpline (612) 296-2600.

The proposed emergency rule may be modified if the modifications are supported by data and views submitted to the agency and do not result in a substantial change in the proposed emergency rule as noticed.

Upon adoption of the emergency rule by the agency, the emergency rule as adopted and its supporting documents will be delivered to the Attorney General for review as to legality and form to the extent form relates to legality. Any person may request notification of the data of submission to the Attorney General. Persons who wish to be advised of the submission of this material to the Attorney General, or wish to receive a copy of the adoptive rule, must submit this written request to Robert J. Baldwin at the address specified above.

The emergency rule will take effect five working days after approval by the Attorney General and be effective for 180 days. The emergency rule will be continued in effect for an additional 180 days if the agency gives notice of continuation in accordance with *Minnesota Statutes*, section 14.35.

Dated: 23 July 1990

Sandra J. Hale
Commissioner of Administration

Rules as Proposed

1230.0100 SCOPE.

Pursuant to *Minnesota Statutes*, chapter 16B, parts 1230.0100 to ~~1230.2300~~ 1230.1910 govern the procurement of materials and services for the state under the competitive bidding requirements.

SMALL ~~BUSINESSES OWNED BY DISADVANTAGED PERSONS~~ BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts ~~1230.1300~~ 1230.1400 to ~~1230.1900~~ 1230.1910 are ~~promulgated~~ adopted pursuant to *Minnesota Statutes*, sections 16B.19 to 16B.22 ~~and 645.445~~ for the purpose of ~~establishing~~ governing procurement procedures relating to the ~~small business and small business owned by socially or economically disadvantaged persons set-aside program~~ preference programs for targeted group or economically disadvantaged area small businesses. These programs are administered by the Materials Management Division ~~of Procurement~~, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155. ~~Parts 1230.1300 to 1230.1900 shall also govern procurement under this program.~~

1230.1500 SCOPE.

~~Subpart 1. Priority of set-aside rules.~~ In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to ~~1230.1300~~ 1230.1399 and ~~these rules~~ parts 1230.1400 to 1230.1910 relating specifically to the ~~set-aside~~ small business procurement program, ~~the rules of the set-aside program~~ parts 1230.1400 to 1230.1910 shall govern.

1230.1550 DEFINITIONS.

~~Subp. 2. Definitions.~~ Subpart 1. **Scope.** The definitions contained in ~~*Minnesota Statutes,* section 645.445~~ part 1230.0200 shall apply in the administration of ~~the set-aside program~~ these preference programs. ~~In addition,~~ The ~~following~~ definitions in subparts 2 to 25 shall also apply.

~~Subp. 3. Terms governing minorities. The terms "racial minorities," "women," and "persons who have suffered a substantial physical disability" contained in *Minnesota Statutes,* section 645.445, subdivision 5 shall have the following meanings:~~

~~A. "Racial minorities" means all persons in one or more of the following categories:~~

~~(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.~~

~~(2) "Hispanic" means all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.~~

~~(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands. This area includes, but is not limited to, China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.~~

~~(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.~~

~~(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the government of the United States and Canada.~~

~~B. "Women" means all persons of the female gender.~~

~~C. "Persons who have suffered a substantial physical disability" means all persons suffering a physical impairment that is likely to cause difficulty in securing, retaining, and/or advancing in employment, and that substantially limits one or more of his or her major life activities, including but not limited to visual, hearing, or special learning impairments.~~

~~Subp. 4. Small business owned and operated by~~ **disadvantaged person.** ~~"A small business owned and operated by a socially or economically disadvantaged person(s)" means a small business as defined in Minnesota Statutes, section 645.445, subdivision 2 which is 51 percent owned and operated on a day-to-day basis by a socially or economically disadvantaged person as defined in Minnesota Statutes, section 645.445, subdivision 5.~~

Subp. 2. **Affiliate or subsidiary of a business dominant in its field of operation.**

A. "Affiliate or subsidiary of a business dominant in its field of operation" means a business that is at least 20 percent owned by a business dominant in its field of operation or by partners, officers, directors, majority stockholders, or their equivalent of a business dominant in that field of operation.

B. "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in part 1230.1600, subpart 3.

Subp. ~~5.~~ 3. **Broker.** "Broker" means a business that carries no inventory and that has no written ongoing agreement with any manufacturer or manufacturer's authorized distributor to sell the products of ~~such~~ the manufacturer.

Subp. 4. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. ~~6.~~ 5. **Contractor.** "Contractor" means a business that is engaged in construction ~~including but not limited to~~ such as general, mechanical, and/or electrical contracting, or that provides a specific service ~~including but not limited to~~ such as trash removal, snow removal, janitorial services, or consultant, professional, or technical services.

Subp. ~~7.~~ 6. **Dealer, jobber, or distributor.** "Dealer," "jobber," or "distributor" means a business that maintains a store, warehouse, or other establishment in which a line or lines of products are kept in inventory and are sold to the public on a wholesale and/or retail basis.

Subp. 7. **Debarment.** "Debarment" means the disqualification of a person to receive invitations for bids or requests for proposals, or the award of any contract by any governmental body, for a specified period of time commensurate with the seriousness of the offense, the failure, or the inadequacy of performance.

Subp. 8. **Director.** "Director" means director of the Materials Management Division or a materials management division manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Material Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means any operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, which does not provide the operator with the exclusive right to profit from his or her effort, commensurate with ownership and to bear the risk of loss or failure and does not meet the test of ownership outlined in subpart 24 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Full-time equivalent employees.** "Full-time equivalent employees" are determined by dividing the total hours worked by all employees in the business during the preceding fiscal year by 2,088 hours.

Subp. ~~8.~~ 12. **Joint venture.** "Joint venture" means the association of two or more businesses, all of which ~~are certified~~ businesses

~~in the small business~~ are certified as a targeted group and/or ~~small business owned and operated by socially and~~ economically disadvantaged ~~persons program~~, for the purpose of receiving a procurement bid award.

Subp. 13. **Liquidated damages.** "Liquidated damages" means a specific sum of money, agreed to as part of a contract to be paid by one party to the other in the event of a breach of contract in lieu of actual damages, unless otherwise provided by law.

Subp. ~~9.~~ 14. **Manufacturer.** "Manufacturer" means a business that makes and/or processes raw materials into a finished product.

Subp. ~~10.~~ 15. **Manufacturer's representative.** "Manufacturer's representative" means a business that has a written agreement or agreements with one or more manufacturers or manufacturer's authorized distributors to sell the products of ~~such manufacturer(s)~~ the manufacturer, but that is not an employee of ~~such manufacturer(s)~~ the manufacturer.

Subp. 16. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions which allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 17. **Person.** "Person" means a natural person or a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates.

Subp. 19. **Reinstatement.** "Reinstatement" means a debarred vendor may seek restoration to state bidders' lists one year from the date of debarment by submitting application to the commissioner through the Material Management Review Board. If restored, the vendor will be subject to a one year probationary period.

Subp. 20. **Responsible bidder.** "Responsible bidder" means a bidder who:

A. is not a broker of, but rather is a manufacturer of, regular dealer in, or the agent of a manufacturer with full knowledge of supplies to be furnished; or

B. if services are to be provided, has the necessary skills or is in the business of supplying these services; and

C. can demonstrate a satisfactory credit standing, lack of tax liability, and the financial capability to perform the contract as evidenced by the ability to obtain bonding when required; and

D. has no record of failure to perform or of unsatisfactory performance of contracts for the state or other customers and is not currently debarred by another government entity for any cause including defaults on contracts, late deliveries, products not meeting specifications, substandard installation, or service; and

E. is otherwise qualified under rule and law, including incorporation in or registration to do business in Minnesota; and

F. has not engaged in unlawful practices, associated with organized crime, operated under false names or fronts as small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G under part 1230.1500, subpart 20.

Subp. 21. **SIC or Standard Industrial Classification.** "SIC" or "Standard Industrial Classification" was developed for use in the classification of business establishments by type of activity, for the purpose of facilitating the collection, tabulation, presentation, and analysis of data collected by various agencies of the United States government, state agencies, trade associations, and private research organizations, for promoting uniformity and comparability in the presentation of statistical data relating to those establishments and their fields of endeavor.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended from consideration for award of contracts by the director of Materials Management while the director determines if there is probable cause for debarment. The suspension shall not be for a period exceeding six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means those certified businesses designated by the commissioner of administration that are majority owned and operated by women, persons with disabilities, or specific minorities and provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially disadvantaged persons.** "Racial minority," "women," and "persons who have suffered a substantial physical disability" shall have the following meanings.

A. "Racial minority" means all persons in one or more of the following categories:

(1) "Black (not of Hispanic origin)" means all persons having origins in any of the Black racial groups of Africa.

(2) "Hispanic" means all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(3) "Asian or Pacific Islander" means all persons having origins in any of the original peoples of the Far East, Southeast

Asia, the Indian subcontinent or the Pacific Islands. This area includes China, Vietnam, Japan, Korea, the Philippine Islands, and Samoa.

(4) "Alaska native" means all persons having origins in any of the original peoples of North America and who maintain cultural identification through tribal affiliation.

(5) "Indian" means an individual having origins in any of the original people of North America who is an enrolled member of an Indian tribe recognized as such by the governments of the United States and Canada.

B. "Women" means all persons of the female gender.

C. "Persons who have suffered a substantial physical disability" means all persons with a physical impairment that is likely to cause difficulty in securing, retaining, or advancing in employment, and that substantially limits one or more of his or her major life activities.

Subp. ~~11.~~ 25. **Third-party lessor.** "Third-party lessor" means a business that as a lessee acts as a lessor to a third party.

Subp. 26. **Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business.** "Small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" means a small business entity with its principal place of business in Minnesota organized for profit, including any individual, partnership, corporation, joint venture, association, or cooperative, which entity is 51 percent owned and operated on a day-to-day basis by citizens of the United States of America.

1230.1600 ELIGIBILITY FOR SET-ASIDE SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Subpart 1. **Eligible businesses.** The following businesses ~~shall be~~ are eligible for participation in the ~~set-aside~~ socially disadvantaged or economically disadvantaged area small business program: manufacturer, manufacturer's representative, dealer, jobber, distributor, contractor, and businesses engaged in a joint venture.

Subp. 2. **Ineligible businesses.** The following businesses ~~shall~~ are not ~~be~~ eligible for participation in the ~~set-aside~~ socially disadvantaged or economically disadvantaged area small business program: brokers ~~and~~, third-party lessors, and franchises.

Subp. 3. **Revenue or sales limitations; Minnesota Small Business Program.** For the purpose of identifying businesses eligible to participate in the Minnesota Small Business Program, the preference and set-aside programs for targeted group small businesses; or for small businesses located in economically disadvantaged areas, the qualifying parameter shall be expressed in terms of gross annual revenues or sales as an upper limitation; i.e. "not to exceed." In no case shall the limitation for any category of business enterprise be set at less than $1,000,000.

A. Standard industrial classification (SIC) codes shall be used in classifying limitations among the variety of businesses potentially eligible for participation in the Minnesota Small Business Program.

B. Limitations, standards, shall be set for each major, two-digit, SIC group based on the following procedure:

(1) Typical financial balance sheet information compiled in annual reports such as the Robert Morris and Associates annual statement studies, Dun and Bradstreet, or similar reporting services will be used to establish the range of annual revenues or sales for a given major group class. This range shall, wherever the data is available, reflect an average of at least three consecutive reporting years, but shall not exceed five years.

(2) The upper limitation defining small business based on annual gross revenues or sales is determined by establishing a representative annual market consisting of the total gross revenues or sales generated by the reporting sample class. The lower quartile, 25 percent, of this market shall represent the small business category.

(3) The average gross revenues of the number of firms it requires to equal the total lower quartile market shall be the upper limit, defined in gross annual revenues or sales, permitted for definition of a small business in Minnesota.

(4) Where the three-digit SIC code data treated in subitems (1) to (3), varies significantly from the two-digit aggregated data or the four-digit data varies significantly from the two- or three-digit classes, a specific limitation shall be established for that three- or four-digit class.

(a) Significant variation for differences between two- and three-digit codes shall be five percent above or below the two-digit standard for gross annual revenue or sales.

(b) Significant variation for differences between three- and four-digit codes shall be five percent, or ten percent above or below the two-digit standard.

(5) After the initial establishment of limitations according to the process described for definition as a small business in Minnesota, for the purposes of this program, the Department of Administration shall in year two of the rule begin a process of reexamining on an annual basis one-third of the groups for appropriate limitations and redefinition where justified.

1230.1700 ~~SELF-CERTIFICATION~~ CERTIFICATION OF ELIGIBILITY.

Subpart 1. **Required information.** To ~~become eligible to receive invitations for set-aside bids~~ qualify for the preference programs established by *Minnesota Statutes*, section 16B.19, subdivisions 2a to 2d, each business shall ~~certify and~~ file with the Materials Management Division ~~of Procurement~~ the following information on the application forms provided:

A. the name and address of the applicant and the principal place of business;

B. ~~whether applicant is applying for~~ which type of designation as a small business ~~or a small business owned and operated by~~ a, socially disadvantaged small business or economically disadvantaged ~~person(s); designation shall be made as to~~ area small business, is being applied for:

(1) socially disadvantaged small businesses are those businesses defined by Minnesota Department of Administration, part 1230.1550, subpart 24; or

(2) an individual business which is not a targeted group business but is owned by a socially disadvantaged person, as defined in part 1230.1550, subpart 24, that is encountering the effects of discrimination as evidenced by the owner lacking adequate external support necessary to operate a competitive business enterprise through a diminished ability to secure:

(a) long-term or working capital financing;

(b) equipment, raw material, or supplier trade credit;

(c) bonding and insurance; or

(d) a proportionate share of the market for its goods and services; or

(3) the small business is located in an economically disadvantaged area as defined in *Minnesota Statutes*, section 16B.19, subdivision 2d, and/or

(a) the owner resides or is employed in an area designated a labor surplus area by the United States Department of Labor;

(b) the owner resides or is employed in a county in which the median income for married couples is less than 70 percent of the state median income for married couples;

(c) the business is a rehabilitation facility or a work activity program as certified by the Department of Jobs and Training; or

(d) the small business owner resides or is employed in an area designated by the commissioner as an economically disadvantaged area under *Minnesota Statutes*, section 16B.19, subdivision 2d;

C. an indication of the type of business operated and the kinds of service, materials, or supplies which can be delivered;

~~C. number of employees;~~

~~D. gross revenues in the preceding fiscal year;~~

~~E. whether the business is an affiliate or subsidiary of a business dominant in its field of operation;~~

~~F.~~ D. a listing of all owners, including percentage of ownership, ~~and all officers of the applicant with~~ method of acquisition, ownership in other firms, and copies of the following documents:

(1) complete financial statements for the business for each of the preceding three fiscal years, or since the inception of the business if established less than three years;

(2) a profile of the owners' management responsibilities and a description of the management responsibilities assigned to other individuals, including a chronological resume for each owner, officer, and other key personnel;

(3) a statement indicating whether or not the business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises which are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

~~G. all other relevant information requested by the division.~~

(5) proof of ownership of business. Owners shall submit proof of their ownership of the requisite percentage of the business at the time the application is submitted, and the proof shall consist of stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, a canceled check used to purchase ownership, or other recognized proof of ownership.

(a) In the case of a sole proprietorship or where documentary proof of ownership is not available, the owner shall clearly state the reasons for such and be prepared to assist the division in further investigation of proof.

(b) If requested, the owners must show how and when the interest in the business was acquired.

(c) The division may require additional proof or information necessary to verify ownership.

E. In addition, for certification under item B, subitem (2), unit (a), (b), (c), or (d), the following information must be provided for the most recent fiscal year and the preceding four years, if the applicant has operated as a business for four years, identifying the fiscal year reporting system used by the applicant and listing in whole dollar amounts:

(1) assets:

(a) cash and equivalent: all cash, marketplace securities, and other near-cash items, excluding sinking funds;

(b) trade receivables (net): all accounts from trade, less allowance for doubtful accounts;

(c) inventory: anything constituting inventory for the business;

(d) all other current: any other current assets, not including prepaid items;

(e) total current: the total of all current assets shown in subitems (a) to (d);

(f) fixed assets (net): all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;

(g) intangibles (net): intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;

(h) all other noncurrent: prepaid items and any other noncurrent assets;

(i) total: total of all items listed above.

(2) liabilities:

(a) notes payable (short-term debt): all short-term note obligations, including bank and commercial paper excluding trade notes payable;

(b) current maturities (long-term debt): that portion of long-term obligations that is due within the next fiscal year;

(c) trade payables: open accounts due to the trade;

(d) income taxes payable: income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;

(e) all other current: all other current liabilities, including bank overdrafts and accrued expenses;

(f) total current: total of all current liabilities listed above;

(g) long-term debt: all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;

(h) deferred taxes: all deferred taxes. Identify federal, state, and local taxes in subtotals;

(i) all other noncurrent: any other noncurrent liabilities, including subordinated debt and liability reserves;

(j) net worth: difference between total liabilities and total assets, including minority interest;

(k) total liabilities and net worth: total of all items listed above.

(3) income data:

(a) net sales: gross sales less returns and discounts allowed, if any;

(b) gross profit: net sales less cost of sales;

(c) operating expenses: all selling, general, and administrative expenses, including depreciation, excluding interest expense;

(d) operating profit: gross profit less operating expenses;

(e) all other expenses (net): includes miscellaneous other income less expenses, such as interest expense, miscellaneous expenses not included in general and administrative expenses netted against recoveries, interest income, dividends received, and miscellaneous income;

(f) profit before taxes: operating profit minus all other expenses (net).

F. If the business seeking certification is a contractor, the information in item E must be submitted in all categories except as modified in the following:

(1) assets:

(a) accounts receivable - progress billings: amounts billed on current contracts excluding retention;

(b) accounts receivable - current retention: amounts held back by customers on current contracts as retention;

(c) inventory: costs attributable to equipment, small tools, supplies, and other deferred costs related to contracts in progress where a portion of the cost applies to work not yet performed;

(d) costs and estimated earnings in excess of billings: the difference between the total of costs and recognized estimated earnings to date and the total billings to date;

(e) total current: total of all current assets shown and as modified, changed, or added in the above definitions;

(f) joint ventures and investments: the total of investments and equity in joint ventures.

(2) liabilities:

(a) accounts payable - trade: open accounts and not obligations due to the trade;

(b) accounts payable - retention: amounts held back as retention in payments to subcontractors on current contracts;

(c) billings in excess of costs and estimated earnings: the difference between the total billings to date and the total of costs and recognized estimated earnings to date;

(d) total current: total of all current liabilities shown and as modified, changed or added in the above definition;

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in the above definitions.

(3) income data:

(a) contract revenues: revenues recognized under percent of completion method (in place of net sales).

G. In separate schedules, all applicants applying under item E or F should show the amounts attributable to depreciation, depletion, amortization, interest income, interest expenses, officers' compensation, and miscellaneous income shown as passive or nonpassive income. A schedule of leased assets with a brief description of type and dollar value must be submitted. A brief outline describing shareholders equity must be submitted, when applicable, for the type of company organization.

In addition, supportive documentation must be submitted when seeking certification under various provisions as follows:

(1) item B, subitem (2), unit (a): for certification as lacking adequate external support in obtaining long-term or working capital financing, any documentation showing denial of loans or offers of loans at terms and rates not currently normal for similar enterprises;

(2) item B, subitem (2), unit (b): for certification as lacking external support in obtaining equipment, raw materials, or supplier trade credit, any documentation showing denial of credit or credit extended at terms, conditions, and rates in excess of the norm expected within similar enterprises;

(3) item B, subitem (2), unit (c): for certification as lacking adequate external support in obtaining bonding and insurance, any documentation showing inability to obtain bonding or insurance at rates and terms normally expected within the industry segment of the applicant.

(4) In all cases, adequacy of documentation, accuracy of financial data, and development of argument and positions with regard to an applicant's lack of external support within any of the four categories of item B, subitem (2), unit (a), (b), (c), or (d), rests with the applicant and must be submitted in writing with the application for certification. The division retains the right of inquiry and verification of all information submitted.

H. When seeking certification under any provision of item B, subitem (1), (2), or (3), or any other certification provision, the applicant shall provide all other relevant or supporting information requested by the division.

I. Denials of certification under these provisions are subject to appeal under subpart 7.

Subp. 2. and 3. [See Repealer.]

Subp. 4. **Notice of changes.** The director of the division ~~of Procurement~~ shall be notified in writing of any ~~and all changes~~ change in the ~~applicant's business which may alter the~~ application or attached information ~~provided above~~ within 30 days of ~~such change(s)~~ the changes.

Subp. 5. **Grounds for rejecting ~~self-certification~~ application.** ~~Each~~ An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the ~~self-certification~~ application form and all supporting documents required by the division ~~of Procurement~~. An application shall be rejected on any of the following grounds:

A. the applicant is dominant in its field of operation or is an affiliate or subsidiary of a business dominant in its field of operation;

B. the applicant has failed to provide all relevant required information;

C. ~~where applying for designation as a business owned and operated by socially or economically disadvantaged person(s),~~ the applicant failed to establish that majority ownership and day-to-day operating control are held by socially disadvantaged small business or economically disadvantaged area small business person(s);

D. the applicant has failed to comply with laws and rules of the state relating to procurement;

E. ~~applicant's failure to comply with the requirements of these rules or Minnesota Statutes, section 16B.19, et seq. faith in application for inclusion in this program; and~~ the applicant has intentionally or negligently falsified application information;

F. the applicant is a broker and/or third-party lessor~~.~~ or operates as a franchiser or franchisee;

G. the applicant's principal place of business is not in Minnesota;

H. ownership of the applicant's business is shared with a previously certified participant who was removed from the bid eligibility list or directory of certified businesses by operation of Minnesota Statutes, section 16B.22, clause (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item I, subitem (2), unit (a), when applying as an individual business under subpart 1, item B, subitem (2).

Subp. 5a. **Criteria for determinations.** The following standards shall be used in determining whether, under subpart 5, item C, a firm is owned and operated on a day-to-day basis by one or more socially or economically disadvantaged persons:

A. The individual's claim, supported by sufficient documentation, that he or she is a socially disadvantaged small business person or an economically disadvantaged area small business person as defined in these rules.

B. The ownership and day-to-day operation of a socially disadvantaged small business or economically disadvantaged area small business must be real, substantial, and continuing, and must go beyond the pro forma ownership of the firm as reflected in its ownership documents. The socially disadvantaged or economically disadvantaged small business owners must have the customary incidents of business ownership and shall share in the risks and profits commensurate with their ownership interests as demonstrated by an examination of the substance, rather than form of the business arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient. The division shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial arrangements, equipment rental or leasing agreements, and relationships with nontargeted businesses that vary from accepted industry practice.

C. The socially disadvantaged or economically disadvantaged area business owner must possess the power to direct the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operation. The firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially or economically disadvantaged owners. There must be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the socially or economically disadvantaged business owners from making a business decision for the firm without the cooperation or vote of any owner who is not a socially or economically disadvantaged person.

D. If the owners of the firm who are not socially or economically disadvantaged persons are disproportionately responsible for the operation of the firm, then the firm will not be considered to be owned and operated by socially or economically disadvantaged persons.

E. All securities that constitute ownership or control or both ownership and control of a corporation must be held directly by socially or economically disadvantaged persons. No securities held in trust or by any guardian for a minor will be considered as held by socially or economically disadvantaged persons in determining the ownership or control of a corporation.

F. The contributions of capital or expertise by the socially or economically disadvantaged owners to acquire their interests in the firm must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or participation as an employee only, rather than as a manager.

G. In addition to the standards in items A to F, the following circumstances will be given special consideration in determining eligibility:

(1) newly formed firms and firms whose ownership or day-to-day operating control or both ownership and control has changed will be closely scrutinized to determine the reasons for the timing of the formation or of a change in the firm;

(2) a previous or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the management responsibilities and capabilities referred to in subpart 5 and this subpart;

(3) any relationship between a socially disadvantaged or economically disadvantaged area business and a business that is not a socially disadvantaged or economically disadvantaged area business that has an interest in the socially disadvantaged or economically disadvantaged area business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

H. The combined gross sales or revenues from businesses operated by the same owners in related fields exceed the highest size standard for the field defined under part 1230.1600, subpart 3.

I. The following standards, along with supporting documentation, shall be used in reaching a determination to certify an applicant under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d):

(1) Financial data for the company seeking certification shall be analyzed using formulas, techniques, processes, and ratios used in the annual statement studies published by Robert Morris and Associates (RMA), Philadelphia. Where RMA data does not reflect or provide adequate comparable data for the applicant's main line of business, the "Industry Norms and Key Business Ratios," published by Dun and Bradstreet Credit Services, or any similar representative reporting service may be used.

(2) Certification determination will be made upon careful review of all the evidence submitted. However, to establish eligibility for this review, the financial data applicable to the applicant company shall fall within the following parameters:

(a) financial ratios: at any point between the lower quartile and the upper quartile. Upper quartile ratings are indicative of a successful company not in need of the assistance provided through certification. Lower quartile ratings indicate a need for additional assistance before certification. Lower quartile businesses will be referred to the Department of Trade and Economic Development for remedial assistance before becoming eligible for reconsideration for certification.

(3) The following ratios and formulas will be used to determine eligibility for certification:

(a) lacking adequate external support in obtaining long-term or working capital financing: earnings before interest and taxes (EBIT)/interest, sales/working capital, quick ratio, fixed/worth, debt/worth;

(b) lacking adequate external support in obtaining equipment, raw materials, or supplier trade credit: current ratio, quick ratio;

(c) bonding and insurance: none - review of documentation only;

(d) the business has not captured a proportionate share of the market for its goods and services, based on the most current annual statement studies published by RMA. The national average revenues appropriate for the applicant business's standard industrial code and asset size will be divided by the national average assets determined similarly and multiplied by the applicant's actual total assets to indicate a proportionate market share. The applicant business's actual revenues will be divided by this proportionate market share to indicate the actual percentage of the proportionate market attained. Any percentage at 75 or less shall qualify for eligibility.

(4) If eligible under subpart 1, item B, subitem (2), unit (a), (b), (c), or (d), all other documentation shall be reviewed to arrive at a determination to grant or deny certification. The key determinant is "lacking adequate external support...as evidenced by diminished ability to secure..." Even though an applicant qualifies as an eligible business on the basis of financial ratios, if the business has been able to secure sufficient loans, bonding, insurance, or credit at the usual industry norms, it is not qualified as there is no evidence showing lack of support. Conversely, the business may show adequate financial ratios but still find itself unable to obtain any, or only partial, amounts of financing, bonding, credit, or insurance needed to remain competitive, or it can only acquire such at unfavorable terms not normal for its industry segment. Upon finding that such circumstances are not a result of internal management deficiencies as indicated by ratios appropriate to these concerns such as the following:

(a) percent profit before taxes/tangible net worth;

(b) percent profit before taxes/total assets;

(c) percent depreciation, depletion, amortization/sales; and

(d) percent officers' compensation/sales;

the business can be certified as a targeted group business. The same management efficiency review shall apply when determining certification due to an inability to capture a proportionate market share; however, no other documentation will need be considered under this eligibility criterion. Findings that a business suffers from internal management deficiencies will require a denial of certification until remedial assistance has been obtained through referral to the Department of Trade and Economic Development for help from public or private resources. When the appropriate ratio indicators fall within the eligible zone, the business may again apply for certification.

The impact of both short- and long-term business cycles for the economy in general and for the particular business segment in specific shall be considered in arriving at certification findings. When appropriate, an average of two to five years of fiscal data for the applicant company shall be used in determining ratio values.

(5) Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines shall be reviewed for certification under those distinctions. If the company operates in more than one SIC classification, the review shall be made under the primary industry segment if 75 percent or more of its net sales or contract revenues are generated by that segment. The business may seek certification for individual product, service, commodity, or construction activities if 25 percent or

more of its net sales or contract revenues is generated by a given category. All other financial data required by this application process must be proportionately attributed to the categories for which certification is sought unless it can be conclusively demonstrated that the dollar amounts shown are directly attributable to specific elements. If the company is unable to provide the breakdown of financial data requested by this rule, it must accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of rejection of application.** After an applicant has received written notice of rejection of ~~its~~ the application ~~to participate in the set-aside program~~ for certification as a socially disadvantaged small business or economically disadvantaged area small business, the applicant may appeal ~~this~~ the decision in writing to the ~~director of the Division of Procurement~~ commissioner of administration within ~~30~~ 15 calendar days of receipt of ~~such notice~~ the determination. ~~The director shall render a decision in writing on the application within 30 days of receipt of the appeal. If the applicant's rejection is sustained by the director, applicant may appeal this decision in writing to the commissioner of administration within 30 days of receipt of such determination.~~ If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under *Minnesota Statutes*, sections 14.57 to 14.62. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if feasible, refer the appeal to the Small Business Procurement Advisory Council for its recommendation before reaching a final decision. The commissioner shall ~~render the~~ make a final decision in writing within ~~30~~ 45 calendar days of receipt of ~~such~~ the appeal.

1230.1800 ~~ESTABLISHMENT OF SET-ASIDE~~ PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

~~Subpart 1. List of set-aside businesses.~~ A ~~list~~ directory of ~~set-aside~~ eligible businesses, ~~properly~~ certified pursuant to part 1230.1700 shall be established and maintained by the division for various commodity classes.

~~Subp. 2. Determination of contracts for set-aside. When a requisition is received by the Division of Procurement and is placed on the list of set-aside contracts, the contract for a particular commodity shall be offered to those businesses on that commodity list and awarded as follows:~~

~~A. For all such requisitions, the Division of Procurement shall establish an estimated price for the goods or services.~~

~~B. All businesses on the set-aside list shall be notified of the estimated price.~~

~~C. First attempt at purchase shall be made from a small business owned and operated by a socially or economically disadvantaged person(s).~~

~~D. Where there is only one business in a given commodity class the business shall be invited to submit a bid based on the estimated price.~~

~~E. Where there are two or more businesses in a given commodity class, competitive bids shall be obtained.~~

~~F. Acceptable bids shall be recorded and the award made to the lowest responsible bidder.~~

~~G. No award shall be made when the low bid is more than five percent over the estimated price.~~

~~H.~~

1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES.

The division shall attempt to achieve utilization of socially disadvantaged small businesses in proportion to their representation in the market. In so doing, the division may use either of the following purchasing methods for awarding requisitions to those socially disadvantaged businesses designated by the commissioner as targeted group businesses.

A. When it is likely that three competitive bids will be obtained from certified targeted group small businesses, the requisition may be set aside for bidding only by those businesses.

(1) The division shall include a statement on the invitation to bid informing all vendors that the bid is set aside for bidding only by certified targeted group small businesses.

(2) The division shall reject any bid by a business not certified as a targeted group small business.

(3) Where there are no bids or no acceptable bids, unsatisfactory bids, if any, will be recorded and the requisition shall ~~thereafter~~ be rebid ~~through normal procurement procedures~~.

~~I. If it is necessary to reject original bids and the bid specifications are substantially changed or were in error, specifications shall be revised and the project rebid under set-aside rules.~~

~~J. If an acceptable bid is received and awarded under normal procurement procedures, the cost or price shall be recorded for report purposes.~~

B. A certified targeted group small business may be awarded up to a six percent preference in the amount bid over the lowest responsible bid from another vendor.

(1) The division shall include a statement on the invitation to bid informing all vendors that certified targeted group vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

(2) When the lowest acceptable bid from a certified targeted group small business is within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified targeted group small business.

(3) When there is no acceptable bid from a certified targeted group small business within six percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING, OR PROFESSIONAL OR TECHNICAL SERVICES.

Subpart 1. **Goal setting.** The division may set goals that require prime contractors to subcontract a portion of any contract for construction, consulting, or professional or technical services to targeted group small businesses.

A. Goals for subcontracting may be independently set for each contract and may vary from contract to contract, depending on the type of work involved and the availability of certified, willing, and able targeted group small businesses open to subcontracts from the prime contractor.

B. Credit toward the goal established for the contract shall be at 100 percent for subcontractors who provide labor, materials, and supplies and at 60 percent for subcontractors who provide supplies and materials only.

Subp. 2. **Subcontracting.** No contractor receiving a subcontract under this program shall in turn subcontract more than 25 percent of the contract dollar amount. A targeted group small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group small business.

Subp. 3. **Waivers.** Prime contractors may obtain waivers from the normal subcontracting goals according to the following procedure:

A. The invitation to bid or request for proposals may as one of the conditions of contract waive subcontracting requirements for all or specific specialties based on the division's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

B. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group subcontractors. The request for waiver with documentation showing the effort and steps taken to secure certified targeted group subcontractors and the results thereof shall accompany the bid response, unless the invitation to bid specified a period after bid opening, not to exceed 72 hours, where documentation of efforts and steps taken to secure certified targeted group subcontractors will be permitted.

C. After the award and the commencement of the project, a prime contractor may request a waiver for a specific specialty if the certified targeted group subcontractor cannot or will not fulfill the subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay. Failure to use the certified targeted group subcontractors specified at the time of award without a grant of waiver will invoke a penalty as outlined in subpart 4.

Subp. 4. **Incentives and penalties.** Bid documents will state whether or not the incentive rule applies for the project being bid. If so,

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price, the incentive to be determined in the following manner:

(1) Contracts qualifying for incentive clauses may be prime contracts at $50,000 or higher in which the goal for subcontractor use has been set at one percent or higher. The maximum goal qualifying for incentives may not exceed 25 percent. Contracts between $2,000 and $50,000 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500 in potential subcontracting awards.

(2) A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified targeted group subcontractors on the project in excess of three percent of the goal set for that project. The monetary incentive in any case shall not exceed six percent of the awarded project price, or $60,000 at the maximum. The form of documented proof shall be specified in the award agreement.

(3) The actual amount of incentive to be paid shall be calculated by the following formula:

(a) subtract the established goal plus three percent from 25 percent;

(b) divide six percent of the project or $60,000, as appropriate, by the number of percentage points in unit (a); and

(c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

(4) The provisions of subitems (1), (2), and (3), shall be applicable to all prime contractors and shall also apply to certified targeted group contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified targeted group subcontractor use without approved waiver shall be penalized up to six percent of the total project value, not to exceed $60,000. The penalty to be assessed will be proportionate to the actual underuse of certified targeted group subcontractors as compared to the project goal. The contractor involved shall be notified in writing of the proposed penalty and the reasons for the penalty. Within 15 calendar days of receipt of the notice the contractor may request a hearing before the Materials Management Review Board. The board may uphold, modify, or reject the penalty. The decision of the board may be appealed within 30 calendar days to the commissioner. If there are facts in dispute, the commissioner may refer the matter to the Office of Administrative Hearings for a contested case hearing under *Minnesota Statutes*, sections 14.57 to 14.62, or, if feasible, may affirm or reject the board's decision.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000, added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the underuse determined in the bid proposal as compared to the announced project goal.

D. The division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group subcontractors are willing and able to do the work.

1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES.

A certified economically disadvantaged small business may be awarded up to a four percent preference in the amount bid over the lowest responsible bid from another vendor.

A. The division shall include a statement on the invitation to bid informing all vendors that certified economically disadvantaged vendors will receive a preference in the amount bid and the amount of the preference to be awarded.

B. When the lowest acceptable bid from a certified economically disadvantaged small business is within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible certified economically disadvantaged small business.

C. When there is no acceptable bid from a certified economically disadvantaged small business within four percent of the lowest acceptable bid from another vendor, award shall be made to the lowest responsible vendor.

D. When the division awards both a preference to a certified targeted group small business and a preference to a certified economically disadvantaged small business on the same requisition, the lowest acceptable bid shall be determined by deducting the preference percent awarded from the acceptable bid by the certified small business.

1230.1850 REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES.

Subpart 1. **Removal for failure to fulfill contract.** A business shall be removed from the bid eligibility lists and shall be ineligible to be awarded contracts when it fails to satisfactorily fulfill the terms and conditions of a contract. Removal or debarment by other governmental entities shall automatically result in removal from these bid eligibility lists as well. Notice of removal from bidding lists and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under this subpart may apply for reinstatement and participation in the preference program and may be listed if the division determines that the business is able to undertake and satisfactorily complete future contracts. As part of the reinstatement evaluation process, the division may require the applicant to provide in writing:

A. an explanation of the steps taken by the applicant to resolve the production, financial, or technical problems that caused its previous failure to perform; or

B. evidence of successful completion of at least four other contracts, including contracts with two public entities, in the same commodity class, field, or type of work in which the applicant seeks to bid or completion of the requirements for reinstatement and probation.

Subp. 3. **Removal from certified directory when a business no longer qualifies.** A business shall be removed from the certified directory and will no longer be eligible for bidding on any set-aside or preference contract when the business no longer qualifies for these preference program under *Minnesota Statutes*, section 16B.22, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal shall be given in writing to the business by the division. Removal is effective upon receipt of the notice by the business. When removal is for loss of status as an economically disadvantaged area, the business shall remain eligible for 120 days after certified small businesses in the area are notified of the termination of the status by the division.

Subp. 4. **Appeal of removal.** When a business is removed from the bid lists and disqualified from further bidding under subpart 1, 2, or 3 or is removed from the certified directory, the business may appeal the removal and disqualification to the commissioner of administration in writing within 15 calendar days of the receipt of the notice of removal. Receipt of the appeal shall be acknowledged

by the commissioner in writing within 15 calendar days of receipt. The commissioner shall request that the business choose either an informal review of the disqualification under item A or a formal review under item B if facts of the matter are in dispute.

A. Under an informal review process, the Small Business Procurement Advisory Council shall consider whether the decision to remove a business from the bid list or certified directory was reasonable and whether the removal is in compliance with subpart 1 or 2. The council will review the facts presented by the business and the division. Within 45 calendar days of the council's receipt of a request for review, the council shall recommend that the commissioner take one of the following actions:

(1) reinstate the business on the bid lists or certified directory;

(2) affirm the removal of the business; or

(3) refer the matter to the Office of Administrative Hearings for a contested case hearing under *Minnesota Statutes*, sections 14.57 to 14.62.

The council's recommendation to the commissioner shall be in writing and include the reasons for its decision. The commissioner shall consider the recommendation and make a final decision on the matter within 15 calendar days of receiving the council's recommendation. The commissioner shall include written reasons for the decision.

B. Within 30 calendar days after a request by the business or the council for formal review, the commissioner will initiate a contested case hearing under *Minnesota Statutes*, sections 14.57 to 14.62, by filing a request for assignment of an administrative law judge with a notice of an order for hearing. When the commissioner receives the report of the administrative law judge, the commissioner shall forward the report to the Small Business Procurement Advisory Council for its review, and the council shall, within 45 days, make its recommendation. The commissioner shall make a final decision on each appeal.

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

To ensure equitable distribution of awards and reduce the dependency of any given business on state awards for a major part of its annual revenues, the following limitations apply:

A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these program to that business exceed three-tenths of one percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute, the Department of Administration, the Department of Transportation, and the University of Minnesota.

B. Eligibility for set-aside or preference for a specific business shall be terminated when the annual review of financial statements or the cumulative record of awards compiled by the division from reports submitted by agencies covered under the statute indicate that any of the following conditions exist:

(1) more than an average of 80 percent of the business's gross revenues or sales are attained through preference or set-aside awards during the second and third years of participation in the program;

(2) for years four and five, the limitation average shall be 50 percent of gross annual revenues or sales;

(3) for years six and beyond, the limit shall not exceed 40 percent.

There will be no limit on awards acquired through the normal competitive bid process at any time.

C. No business shall be permitted to participate in the preference and set-aside programs indefinitely. A business will not be certified but will graduate from the preference and set-aside programs when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to *Minnesota Statutes*, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

(2) demographic statistics justify loss of status as a labor surplus area, a 70 percent median income county, or a disadvantaged area; or

(3) the business has captured a proportionate share in its market for assets employed, by the following averages:

(a) 200 percent in year one;

(b) 175 percent in years one and two;

(c) 150 percent in years one, two, and three;

(d) 125 percent in years two, three, and four;

(e) 125 percent in years three, four, and five, or any three consecutive years thereafter.

1230.1900 GENERAL TERMS AND CONDITIONS.

Subpart 1. **Inability to perform.** ~~A~~ An eligible business ~~which, if offered an award,~~ that finds ~~that~~ it cannot produce, supply, or

construct according to the bid terms and conditions of a contract for reasons beyond its control shall~~,~~ ~~within seven calendar days after receipt of notice as low bidder,~~ immediately notify the division ~~of Procurement~~ in writing of the reasons therefor. When the commissioner ~~of administration finds~~ determines that the ~~low bidder~~ business is unable to perform for the reasons stated, the division shall notify the Department of Trade and Economic Development ~~shall be notified by the Division of Procurement in accordance with *Minnesota Statutes*, section 16B.20,~~ so that the commissioner of trade and economic development can assist the small business in attempting to remedy the causes of the inability to perform. The division shall notify the business of the referral to the Department of Trade and Economic Development and the notice shall include a statement that any records of the Department of Trade and Economic Development in assisting the small business may be discoverable in a contested case or judicial procedure. Failure to enter into ~~the~~ a contract ~~or~~, to accept an offered award, or to satisfactorily complete a contract for documented reasons beyond its control will not automatically disqualify a business from further bidding. ~~The records of the Procurement Division shall show the reason(s) for such failure.~~

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business's inability to perform. If the division decides that delay is inappropriate because of the nature of the bid or contract, the division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

B. Failure of the business in question to reasonably cooperate with either the division or the Department of Trade and Economic Development shall be considered a failure to fulfill the terms of a contract and shall be handled according to part 1230.1850, subpart 1. The records of the division shall document the actions taken relative to each case of inability to perform handled under this subpart.

Subp. 2. to 4. [See Repealer.]

Subp. 5. **Dividing bid invitations.** The director of the division ~~of Procurement may~~ shall divide bid invitations by dollar amounts, units of production, or duration of contract to facilitate awarding set-aside or preference contracts ~~to business in the set-aside program~~ wherever the division is considered feasible.

Subp. 6. [See Repealer.]

Subp. 7. **Annual reporting requirement.** The following reporting requirements apply to the socially disadvantaged or economically disadvantaged area small business programs:

A. Businesses eligible to participate in these programs shall, within 30 calendar days of a request by the division, verify information on file with the division for that business, make any necessary changes, and submit a complete financial statement to the division. The information on file with the division will include:

(1) the name and address of the applicant and its principal place of business;

(2) the applicant's gross revenues in the most recently completed fiscal year;

(3) whether the applicant's business is an affiliate or subsidiary of a business dominant in its field of operation;

(4) a listing of all owners, including percentage of ownership, and all officers of the applicant, with full disclosure of all owners' and officers' direct and indirect involvement in other businesses and enterprises that are in the same field of operation as the applicant, unless ownership is by common stock regularly bought and sold through recognized exchanges; and

(5) all other relevant or supporting information necessary for verifying status resulting in eligibility under certification procedures if requested in writing by the division, before or after the annual reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the certified directory.

1230.1910 CONSULTANT, PROFESSIONAL, AND TECHNICAL PROCUREMENTS.

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of consultant, professional, and technical procurements under *Minnesota Statutes*, section 16B.19, subdivision 2.

Subp. 2. **Awards.** Division certification is not required for individuals who provide consultant, professional, or technical services and who are not organized as a business, corporation, partnership, proprietorship, or other recognized business structure. An individual person may be awarded contracts under *Minnesota Statutes*, section 16B.19, subdivision 2, provided that the contracting agency maintains records stating that the individual meets the terms governing socially or economically disadvantaged area persons established in part 1230.1500, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. *Minnesota Rules*, parts 1230.1700, subparts 2 and 3; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300 are repealed.

EFFECT OF EMERGENCY AMENDMENTS. After the emergency amendments expire as provided in *Minnesota Statutes*, section 14.35, the permanent rules as they read prior to those amendments shall again be in effect, except as they may be subsequently amended, and all rules that were repealed in these rules shall be revived.

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Emergency Rule Amendments Relating to the Small Business Procurement Program

AFFIDAVIT

Having investigated all known possibilities, I swear to the best of my belief and knowledge that there is no official rulemaking mailing list pursuant to Minnesota Statutes 14.14, Subd. 1a, for the Department of Administration, a state agency which does not typically govern the public and therefore does not typically promulgate rules.

Dorothy J. Lovejoy

Dorothy J. Lovejoy, Manager
Customer & Vendor Services
Materials Management Division
Department of Administration

Notarized:

Subscribed & sworn to before me this 11th day of September, 1990.

Joyce Dehn
Notary Public

JOYCE DEHN
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
My Comm. Expires May 22, 1993

(1.)

Official Notices

Pursuant to the provisions of Minnesota Statutes §14.10, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Department of Administration

Materials Management Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program

NOTICE IS HEREBY GIVEN that the State Department of Administration, Materials Management Division, is seeking information or opinions from sources outside the agency in preparing to amend or repeal rules in effect governing the program for small businesses owned by disadvantaged persons, Chapter 1230.1400 thru .2300, and to add new parts and subparts governing eligibility; targeted and/or preference procurements, proportionate purchasing, waivers, incentives/penalties, set-aside, limits, and graduation; removal from eligibility lists; which were authorized by the legislature during the 1990 session. The adoption of the rule(s) is authorized by *Minnesota Statutes*, 16B.04, subdv 1, (subject to Chapter 14) which permits the agency to adopt, amend, and rescind rules relating to any purpose, responsibility, or authorization in (the) chapter, specifically subdv 2 (1), supervise, control review, and approve all State contracts and purchasing. The new legislation specifically authorized the Department in amended Statute 16B.19, Subdv 1 (a) to adopt rules defining "small business"; and amended Statute 16B.22 (a) to adopt by rule, standards and procedures for certifying that small businesses, small targeted group businesses, and small businesses located in economically disadvantaged areas are eligible to participate . . . ; adoption of rules of hear appeals and grievances and to exclude or limit participation of non-manufacturing business, such as third party lessors, brokers, franchises, jobbers, manufacturers representative and others, and to set time limits and other eligibility limits on business participation . . . sections 31 and 33 of the new legislation authorizes the Department to adopt these rules as emergency rules, and allows initial implementation of the program under existing rules.

The State Department of Administration requests information and opinions concerning the subject matter of the rule(s). Interested persons or groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Department of Administration
Materials Management Division
50 Sherburne Avenue, Room #112
Attn: R. J. Baldwin
St. Paul, Minnesota 55155

Oral statements will be received during regular business hours, 8:00 a.m. to 4:30 p.m. Monday thru Friday over the telephone at (612) 297-2543, and in person at the above address.

A draft copy of the proposed rule amendments is available for review at the reception desk, room #112 at the above address or a copy can be mailed upon request in writing or by calling the Materials Management Division Helpline at (612) 296-2600.

All statements of information and opinions will be accepted until June 22, 1990. Any written material received by the State Department of Administration shall become part of the rulemaking record to be submitted to the Attorney General or Administrating Law Judge in the event that the proposed amendments and repealing action is adopted.

Dated: 21 May 1990

Sandra J. Hale
Commissioner of Administration

(Notice of Solicitation of Outside Information or Opinions)
Department of Administration, Materials Management Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program.

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jobbers, manufacturers representative and others, and to set time limits and other eligibility limits on business participation... sections 31 and 33 of the new legislation authorizes the Department to adopt these rules as emergency rules, and allows initial implementation of the program under existing rules.

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Sandra J. Hale

May 21, 1990

Sandra J. Hale
Commissioner of Administration

(2.)

PETITION TO ADOPT, SUSPEND, AMEND OR REPEAL... NONE RECEIVED.

NOT REQUIRED

(3.)

AUTHORIZING RESOLUTION...

NOT APPLICABLE

(9.) CERTIFICATE OF RESOLUTION;

NOT APPLICABLE

(11.) WRITTEN REQUESTS, SUBMISSIONS, COMMENTS...

NOTICE OF SOLICITATION; 10 COPIES - ATTACHED

NOTICE OF INTENT TO ADOPT; NONE RECEIVED

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: May 23, 1990

COMMENTS OF: GEORGENE BERGSTROM

AFFILIATION: SM BUS ADVISORY COUNCIL MEMBER

PHONE: 861-5410

STREET: 5652 Clinton Avenue South

CITY: Minneapolis

STATE: MN

ZIPCODE: 55419

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED by phone.

1230.1600 ELIGIBILITY FOR SMALL, SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM.

Regarding which businesses are eligible or ineligible. The broker, 3rd-party lessors and franchises are ineligible. They are all ineligible. Now we need to either find a different definition for broker.

What we need are businesses that have to buy from the distributor not directly from the manufacturer. (Are there situations?) Yes, when mfg will not go directly with a business, but through a distributor:

(i.e. 3M) I cannot go directly to 3M for diskettes. They go through a distributor and must carry a large inventory. So I cannot qualify as a distributor.

(i.e. carpeting) I cannot carry inventory. I can go to the mill but will be paying a higher cost figure because I cannot buy in volume to get cost down.

There are not a few isolated cases. I can go on and on. Like in my computer industry (i.e. Epson) I would have to sell $200,000/mo to be a distributor. Obvisouly, I would no longer be a small bus. State agencies consistently request Epson only, or 3M only do not substitute -- locking out small businesses. Something has to be done with that rule.

Finding a different broker is not easily done. Maybe a letter from the distributor, like now a letter is required from mfg saying "so&so is a mfg's rep". But if I can get a letter from a distributor saying "I am able to sell." Right now this system that we have now locks out small businesses.

Besides the fact that it is kind of ignored. (What is?) This rule. Unless somebody presses it like a few years ago. Somebody brought up a person couldn't because they were a broker. It is largely ignored unless somebody wants to hurt someone else.

(Have you a particular suggestion you wish to offer?) To redefine broker or eligible businesses; a clause possibly that "they are inelligible except when the product cannot be bought directly from mfg requiring small business carry a heavy inventory." In the case of large pcs of equipment, like $20,000, I cannot afford to keep in inventory -- mfg always go through distributors which locks small business out. Or possibly a clause; like, "When in cases impossible to go through the mfgr," or "Except in cases when buying direct from mfg is not possible or restricted by mfgr" or "When it would make it a financial hardship to go to mfgr."

Dorothy may have some ideas on how to word that.

1230.1860 LIMITS TO PROGRAM PARTICIPATION

Under B. (1) "more than an average of 80% of the businesses gross revenues/sales are attained through preference or set-aside awards during years 2 and 3 of participation in the program; "

You cannot get more than 80% of your business from program in year 2. That ought to be taken out of there. The first year the company is in business is really a wasted year in the sense of generating business. It is getting your feet on the ground. The second year you are just starting to generate business. You cannot get started that quickly. Its very difficult to get into the private industry to even get 20% -- not by the second year.

Business is not capable of generating revenues to support it to that extent. I think the second year should be dropped. The 3rd year of participation under this is fine and the rest is fine as written.

I got off pretty quickly but I was unusual. Small Business Industry Administration states not to expect a profit for first five years.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 22, 1990

COMMENTS OF: Doug Lemon

AFFILIATION: Express Business Services

PHONE: 870-0428

STREET: 1433 E. Franklin Avenue South

P.O.BOX:

CITY: Minneapolis

STATE: MN

ZIPCODE: 55404

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED via phone message.

I called to let you know that I oppose the rules the way they are currently written specifically the two- to four-year elimination. My number is 870-0428.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 22, 1990

COMMENTS OF: Don St. Claire

AFFILIATION: Don's TV

PHONE: 644-6806

STREET: 1342 Van Buren

CITY: St. Paul

STATE: MN

ZIPCODE: 55104

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED via phone message.

This is Don St. Claire and Don's TV regarding the rules.
I'm against the proposed rules that you do have with the limitations. I'll be talking to you Monday. Thank you very much.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 20, 1990

COMMENTS OF: Liz Newberry
Equal Opportunity Coordinator
AFFILIATION: Metropolitan Council
PHONE: 612/291-6359 or TDD 612/291-0904
STREET: Mears Park Centre
230 East Fifth Street
CITY: St. Paul
STATE: MN
ZIPCODE: 55101

SUBJECT: Draft Rules for Socially Disadvantaged or Economically Disadvantaged Areas Small Business Program

I have another comment I thought I would pass along to you on the draft rules for the small business program. I am passing it on to you at the staff-to-staff level; not as a formal comment by my agency.

Definition of persons with a disability (1230.1500, Subp. 2D (page three)). The definition is limited to people with a physical impairment. The Minnesota Human Rights Act includes people with a physical, sensory or mental impairment (M.S. 363.01, subd. 25). You may want to make the definition for the small business program consistent with the human rights act. Also, the definition of disability in the human rights act was amended during the last legislative session to people with a "material" disability. The draft rules for the small business program refer to a "substantial" disability. "Substantial" disability may be the appropriate terminology for the small business program, but you may want to check on the legislative history on the change in the human rights act. I believe the change was to broaden the definition of disabilities protected by anti-discrimination laws. The small business program is an affirmative action program, so restricting participation to people with more substantial disabilities may be appropriate.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 15, 1990

COMMENTS OF: Dorothy Cartier

AFFILIATION: Gladstone Construction

PHONE: 771-4990

STREET: 1315 Frost Avenue

CITY: St. Paul

STATE: MN

ZIPCODE: 55109

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED by phone.

I'm a General Contractor and I am addressing general contracting.

I would like to discuss limits under a million dollars which is a lot of money. When working as a general contractor your contracts are encompassing all the other subs; therefore, on a bid for say $200,000 you may only be doing 40,000 of that work. You are supervising and running the job.

Q. It does not take long in inflationary days to get to a million dollars. So maybe take a look at the time period it would take for a general to get to a million, than for a subcontractor, because their contracts would be for more dollars. I could see something like that for i.e. asbestos. I see the insurance costs, the bonding costs, etc. that get up there very quickly and are not costs carried by subs.

As far as graduating from the program, I think that's important in the respect that by the time they are graduated, they are not dependent on that program. I've been operating under the program since 1986. The majority of our dollars are not from program; maybe only about 30% are from the program. It is not geared for generals to be sustained on that. If we did 700,000 in a year, probably only 140 to 150,000 were a result from that program. I do believe the program is good in the respect that you don't become dependent on the program. The formulas are good.

I would also like to comment that it has worked well for me in the respect that I have been able to grow myself in the industry. If this program had not been implemented, I would not have been able to. I'm not referring to

money but the ability to be credible in the industry; the ability to deal with others -- to be a woman-owned business, they would not want to consider you. They may not want to talk to you when they hear a woman's voice. That is not the case any more. That is a case I've seen grow.

It would be nice to see, and I'm learning through this process, more that can be passed on so that more can enter the program. Basically you need help. It's not in books, schools, colleges as to where you get the information as to hands-on for small businesses.

These are the things in the existing program that I wanted to comment on.

I would like to recommend that the million be increased to say a million and a half or something in that area for general contractors.

As far as the program to have some type of mentor type program involved. I have no clear-cut ideas on this. But this is such a competitive industry that I don't have a real formal idea on how this would/could work.

Minnesota Department of
Trade and Economic Development

Business Promotion Division

900 American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101-1421

612/296-3977
Fax: 612/296-1290

June 14, 1990

Mr. Robert J. Baldwin
Materials Management Division
Department of Administration
50 Sherburne Avenue #112
St. Paul, MN 55155

Re: Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program (Second Draft, May 17, 1990)

Dear Mr. Baldwin:

This is in response to the Department of Administration's request for opinion on the proposed rules which was published in the **State Register** May 29, 1990.

I have two comments on Proposed Rule 1230.2000, Subp. 1 (pages 29 and 30 of the May 17 draft) concerning the role of the Department of Trade and Economic Development in assisting an otherwise eligible small business in remedying its inability to perform a set-aside award.

1. Notice of Discoverability of Assistance Provided by the Department

   The proposed rule should explicitly state that the results of assistance provided by the Department of Trade and Economic Development may be discoverable in any administrative or judicial proceeding arising from a business' participation or attempted participation in the set-aside program.

   Proposed Rule 1230.1850 provides for an appeal process that may include a contested case hearing under the Administrative Procedure Act. If the appeal occurs after the business has been assisted by the Department of Trade and Economic Development, it appears likely that the findings and conclusions of the Department in providing that assistance will be discoverable during the contested case proceeding. (See Minn. Stat. §14.60; Minn. Rules 1400.6700, Subp. 2.) This very likely could result in the disclosure of data the firm believed it was supplying in confidence to the Department. In addition, in cases where the Department concludes the vendor's practices and performance are satisfactory, and that the Department of Administration is wrong,

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An Equal Opportunity Employer

this Department could be in a position of testifying against the Department of Administration. I strongly suggest including in the rule an explicit statement concerning potential discovery to place all parties on notice of these risks at the time the decision is made to refer the business to the Department of Trade and Economic Development.

2. Proposed 10-Day Delay in Award or Contract Completion Date

Proposed Rule 1230.2000, Subp. 1.A. authorizes the Department of Administration to delay an award or completion of a contract for up to ten days to "allow the commissioner of the Department of Trade and Economic Development or the business to remedy the business' inability to perform." There are two problems here.

First, it has been our experience in providing business assistance that ten days often is not enough time to diagnose a business problem, let alone assist a firm in remedying it. The Department of Administration may wish to consider amending the proposed rule to allow an extension of the time period in cases where remedial assistance can be provided without jeopardizing the bid or contract.

The second problem appears to be a drafting problem, but if it is not corrected it expands the responsibility of the Department of Trade and Economic Development beyond what currently is provided by statute and could expose the Department to liability. The proposed rule as it is drafted grants the ten-day delay to "allow the Department...to remedy the business' inability to perform." Minn. Stat. 16B.20, Subd. 1 (as amended by Chap. 541, Laws of Minnesota 1989) requires the Department to assist the business in attempting to remedy the inability to perform, but the responsibility for actually remedying the situation belongs to the business. I recommend that the first paragraph of page 30 of the May 17 draft be amended as follows:

> A. The Division may, if circumstances permit, delay an award or completion of a contract for ~~up to ten~~ days a reasonable period of time to allow the commissioner of the Department of Trade and Economic Development to provide assistance or to allow the business to remedy the business' inability to perform. If the Division decides that delay is inappropriate because of the nature of the bid or contract, the Division may seek other solutions. The decision to proceed shall not be prejudicial to the record of the business in question.

Thank you for the opportunity to comment on these proposed rules.

Sincerely,

Charles A. Schaffer
Director
Minnesota Small Business Assistance Office
296-0617

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 14, 1990

COMMENTS OF: Charles A. Schaffer, Director
Minnesota Small Business Assistance Office

AFFILIATION: Minnesota Department of Trade and Economic Development

PHONE: 612/296-0617

STREET: 900 American Center Building
150 East Kellogg Boulevard

CITY: St. Paul

STATE: MN

ZIPCODE: 55101-1421

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED by fax 6/14/90.

Re: Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program (Second Draft, May 17, 1990)

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(See Minn. Stat. 14.60; Minn. Rules 1400.6700, Subp. 2.) This very likely could result in the disclosure of data the firm believed it was supplying in confidence to the Department. In addition, in cases where the Department concludes the vendor's practices and performance are satisfactory, and that the Department of Administration is wrong, this Department could be in a position of testifying against the Department of Administration. I strongly suggest including in the rule an explicit statement concerning potential discovery to place all parties on notice of these risks at the time the decision is made to refer the business to the Department of Trade and Economic Development.

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METROPOLITAN COUNCIL *Mears Park Centre, 230 East Fifth Street, St. Paul, MN. 55101 612 291-6359*

June 20, 1990

Department of Administration
Materials Management Division
50 Sherburne Av., Room #112
St. Paul, MN 55155
Attn: R. J. Baldwin

Re: Comment on Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program

Dear Mr. Baldwin:

The proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program, Section 1230.1860, Limits to Program Participation, sets the following limitation on participation in preference and set-aside programs for economically disadvantaged small businesses:

> A. Eligibility for participation in preference or set-aside provisions of this program shall be temporarily suspended, for the fiscal year only, for any certified economically disadvantaged small business when the total awards under these programs to that business exceeds 3/10ths of 1 percent of the total anticipated awards. These limitations shall be applied individually and not in the aggregate by the agencies covered under the statute: the State of Minnesota Department of Administration, the Minnesota Department of Transportation, the University of Minnesota, and the Metropolitan Council and Agencies.

Comment

Minnesota Statutes 16B.22(c) authorizes the Commissioner of Administration to make rules that set time and other eligibility limits on business participation in programs under sections 16B.19 to 16B.22. Minnesota Statutes 161.321, subd. 6, governing the Minnesota Department of Tranportation, specifically states that rules adopted by the Commissioner of Administration limiting participation by certified businesses, apply also to the Minnesota Department of Transportation. However, Minnesota Statutes 473.142, governing metropolitan agencies does not include this language. Therefore, I do not believe that the Commissioner has the authority to make rules limiting business participation in the Council's program or in other metropolitan agencies' programs.

Sincerely,

Steve Keefe

Steve Keefe
Chair

METROPOLITAN COUNCIL
Mears Park Centre, 230 East Fifth Street, St. Paul, Minnesota 55101
612 291-6359 TDD 612 291-0904

DATE: June 20, 1990

TO: Dick Diercks, Bob Baldwin

FROM: Liz Newberry, Equal Opportunity Coordinator

SUBJECT: Draft Rules for Socially Disadvantaged or Economically Disadvantaged Areas Small Business Program

I have another comment I thought I would pass along to you on the draft rules for the small business program. I am passing it on to you at the staff-to-staff level; not as a formal comment by my agency.

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STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: JUNE 20, 1990

COMMENTS OF: STEVE KEEFE, CHAIR

AFFILIATION: METROPOLITAN COUNCIL

PHONE: 612/291-6359

STREET: Mears Park Centre

230 East Fifth Street

CITY: St. Paul

STATE: MN

ZIPCODE: 55101

Re: Comment on Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program

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COMMENT: Minnesota Statutes 16B.22(c) authorizes the Commissioner of Administration to make rules that set time and other eligibility limits on business participation in programs under sections 16B.19 to 16B.22. Minnesota Statutes 161.321, subd. 6, governing the Minnesota Department of Transportation, specifically states that rules adopted by the Commissioner of Administration limiting participation by certified businesses, apply also to the Minnesota Department of Transportation. However, Minnesota Statutes 473.142, governing metropolitan agencies does not include this language. Therefore, I do not believe that the Commissioner has the authority to make rules limiting business participation in the Council's program or in other metropolitan agencies' programs.

Route One Box 103
Sandstone, Minn 55072
612-245-2262 ext 427 (days)

State of Minnesota
Customer and Vendor Services
112 Administration Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: Draft Rules for Small & Disadvantage Businesses

Attn: Ruth Olson

I have conducted a review of the proposed rules given to us at our recent Small Business Advisory Council Meeting and offer a few comments. First of all for the most part, I have no real problem with the general direction that the rules are taking as I feel that the real test of the rules will come after being in effect a year or so and seeing what result or lack of results are found in comparison to present rules or guidlines of the past. Anything found after this typed sentence, is of course, my own opinion and not that of the entire advisory council and its honorable members.

Page 5 lines 14-16 I feel strongly that this figure of 1,000,000 should not be "messed" with, that is this should be a minimum upper cap and not subject to change. leave as written

Page 7 thru 16 In review of the items required to support an application, I feel that for the most part, there will be problems getting small and disadvantaged firms in submitting all of this information. What ever happened to our proposed or requested short and single page submittals? Now I may be somewhat biased, but If I was a main street Gronegan, MN business and was required to submit the above just to be certified, without knowing what amount of business this would ever bring me, I think I would think twice. I really don't have the answer to what I am attempting to ridicule but do know that if you want to do business with small and disadvantaged businesses that Government Officials have to be accomodating and perhaps just a bit helpful which may include reducing paperwork and red tape? Oh, by the way, Gronegan is a Pine County town that all buildings are in shambles, all business is ceased.....

Page 24 lines 1 thru 6.... I feel that if the Small Business Advisory Council is going to be able to give any appeal any kind of consideration, the time table set forth here is not realistic..Depending on when the appeal is receipted by the Commissioner, there may be days passed before the council even gets to hear or review the appeal ie times when there is not a quorum. I feel that there is no great loss to the person making the appeal if it takes him 60 to 90 days for an answer because what we really are talking about is several years of "cuddling, preference" not just a few months. suggest final decision within 90 days of receipt of appeal

Page 25 line 22...The requirement of 3 competitive bids, I feel, in most cases is to restrictive. The Federal Government in all its infinite Wisdom, only requires the contracting officer to be assured of 2 or more Small Business Bidders to be allowed to setaside a contract requirement.

Now, I do not say that the Federal Government and its 10,000 pages of procurement regulations are correct, but if billions can be spent effectively on 2 or more bidders, why not the same language in this case?? Suggest this line to read in part 2 or more competitive bids, after all, we are trying to enhance the opportunities.

page 26 line 22 I never have liked the words "may, or like words" as they require no action. I suggest this line read in part, "shall set goals.

line 26 this line and paragraph following should alleviate any fears one has about the above wording, as it allows different goals from contract to contract so that adjustments can be made where the goal may be very minute in percentage. Leave this in

Page 27 Line 5 - 9. I like this, butwho will monitor line 7 thru 9 and how will the Small Business Advisory council get feedback on these contractors or types of contracts where goals can be exceeded?

Lines 17 - 21 Will there be a requirement for someone from Administration to verify this request for waiver?? Testimony has revealed that at times, listed subs were never contacted to perform the work as listed on contract submittals. This waiver request is good, but lets make sure that it can be investigated and not just a paper process....

Lines 22 to 28 Once again good, but is there sufficient manpower to monitor?????????

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Page 28 lines 9 thru 12--this is good, but whatever cash penalty is extracted for failure to meet established goals, I feel the penalty should be more than that for exceeding the goals, as mentioned above. These two need to be looked at together... Maybe 4 to 7 %?

Page 28 Line 13 thru 17 This needs to be in the rules, but why not make this penalty large enough so that any large business contractor who easily can outbid smaller and absorb 6 percent, feels the "bite" and decides to meet goals in their submittals?? This should be a minimum of 10 percent for not even trying to meet goals. At any time

they feel they can't meet goals becasue of lack of subcontractors, there is a waiver procedure they can follow. Make them want to at least try by having a 10% add on unless a waiver has been applied for

Page 31 lines 1 thru 7 Once again no problem, but do to the council's past performance of attending meetings, would like to see more time so that any review, denial and or recommendation can be given proper attention

Page 32 Lines 1 thru 29 and continuing for balance of section--I have no real comments on this except that the real test of these guidelines will come after business are limited and we are able to monitor them to see the affects and if they can stay in business of if these limits need raising/lowering. Now the comment is--Will the Adminsitration Department be able to monitor the effects and provide them to the Small Business Council in years 3 and 4 and on??? Now if I'm the only one interested, and I'm removed from the council, this will be easy....But really, I beleive the true worth of this program will be determined 4 to 5 years from now.....

The rest is really not exciting enough for me to comment.

I would once again like to point out, that the above is not intended to offend anyone, is a product of my own opinion, and I would like this letter to be one of the "25 comments" that requires a review.

Thanks for allowing us as Small Business Council memebers a chance to comment on the rulemaking process. Hopefully added participation by our group will enable the Administration Department to better the program they are about to partake in. (as you can tell, I do not have SpellChek)

Sincerely

Mike Bjorklund

cc Mr. John Haggerty
Ms Dorothy Lovejoy

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION
MATERIALS MANAGEMENT DIVISION
CUSTOMER & VENDOR SERVICES

DATE: May 23, 1990
COMMENTS OF: MIKE BJORKLUND
AFFILIATION: SM BUS ADVISORY COUNCIL MEMBER
PHONE: 612/245-2262 X427 (DAYS)
STREET: ROUTE ONE
P.O.BOX: BOX 103
CITY: SANDSTONE
STATE: MN
ZIPCODE: 55072

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT PER LETTER RECEIVED MAY 29, 1990:

I have conducted a review of the proposed rules given to us at our recent Small Business Advisory Council Meeting and offer a few comments. First of all for the most part, I have no real problem with the general direction that the rules are taking as I feel that the real test of the rules will come after being in effect a year or so and seeing what result or lack of results are found in comparison to present rules or guidelines of the past. Anything found after this typed sentence is, of course, my own opinion and not that of the entire advisory council and its honorable members.

Page 5 Lines 14-16: I feel strongly that this figure of 1,000,000 should not be "messed" with, that it should be a minimum upper cap and not subject to change. Leave as written.

Page 7
thru 16 In review of the items required to support an application, I feel that for the most part, there will be problems getting small and disadvantaged firms in submitting all of this information. What ever happened to our proposed or requested short and single page submittals? Now I may be somewhat biased, but if I was a main street Gronegan, MN business and was required to submit the above just to be certified, without knowing what amount of business this would ever bring me, I think I would think twice. I really don't have the answer to what I am attempting to ridicule but do know that if you want to do business with small and disadvantaged businesses that Government Officials have to be accommodating and perhaps just a bit helpful which may include reducing paperwork and red tape? Oh, by the way, Gronegan is a Pine County town that all buildings are in shambles, all business is ceased.....

Page 24 Lines 1-6: I feel that if the Small Business Advisory Council is going to be able to give any appeal any kind of consideration, the time table set forth here is not realistic...depending on when the appeal is receipted by the Commissioner, there may be days passed before the council even gets to hear or review the appeal; i.e. times when there is not a quorum. I feel that there

is no great loss to the person making the appeal if it takes him 60 to 90 days for an answer because what we really are talking about is several years of "cuddling, preference" not just a few months. Suggest final decision within 90 days of receipt of appeal.

Page 25 Line 22: The requirement of 3 competitive bids, I feel, in most cases is too restrictive. The Federal Government in all its infinite wisdom, only requires the contracting officer to be assured of 2 or more Small Business Bidders to be allowed to set aside a contract requirement. Now, I do not say that the Federal Government and its 10,000 pages of procurement regulations are correct, but if billions can be spent effectively on 2 or more bidders, why not the same language in this case?? Suggest this line to read in part 2 or more competitive bids, after all, we are trying to enhance the opportunities.

Page 26 Line 22: I never have liked the words "may, or like words" as they require no action. I suggest this line read in part, "shall set goals."

Line 26: This line and paragraph following should alleviate any fears one has about the above wording, as it allows different goals from contract to contract so that adjustments can be made where the goal may be very minute in percentage. Leave this in.

Page 27 Lines 5-9: I like this, but who will monitor line 7 through 9 and how will the Small Business Advisory Council get feedback on these contractors or types of contracts where goals can be exceeded?

Lines 17-21: Will there be a requirement for someone from Administration to verify this request for waiver?? Testimony has revealed that at times, listed subs were never contacted to perform the work as listed on contract submittals. This waiver request is good, but lets make sure that it can be investigated and not just a paper process.

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Thanks for allowing us as Small Business Council members a chance to comment on the rule-making process. Hopefully added participation by our group will enable the Administration Department to better the program they are about to partake in.

Associated General Contractors of Minnesota

Contractors Building Tomorrow Today

Kellogg Square, 111 E. Kellogg Boulevard, Suite 105, St. Paul, MN 55101
Telephone (612) 291-1102 MN Wats (800) 552-7670 Fax (612) 291-0011

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Executive Director
DONALD K. DEAN

FACSIMILE TRANSMISSION

DATE: 6-22-90 4:10 PM

TO: Minn. Dept. of Adm. / Material Mgmt Div.
Attn:
Ms. Ruth Olson

FROM: ~~Todd~~ Goderstad
Associated General Contractors of Minnesota

RE: Rule Comments

Number of pages including this cover sheet: 3

Our facsimile number is 612-291-0011

If there is any problem receiving this message, please call (612) 291-1102 and ask for Pat Lynch.

MESSAGE/SPECIAL INSTRUCTIONS

RECEIVED AT 1 OF
DEPT OF ADMIN
DIV OF PROCUREMENT
JUN 22 4 22 PM '90

Todd M. Goderstad
BUILDING DIVISION ADMINISTRATOR

Associated General Contractors of Minnesota

Kellogg Square
111 E. Kellogg Blvd.
St. Paul, MN 55101

Telephone (612) 291-1102
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Minneapolis
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Plymouth

Affiliate Division
RICHARD C. SIEL
Shakopee

Executive Director
ARNOLD R. CROWE

June 22, 1990

State of Minnesota
Department of Administration
Materials Management Division
112 Administrative Building
50 Sherburne Avenue
St. Paul, Minnesota 55155

Re: Proposed Emergency Rules on Small, Targeted Small, and Economically Disadvantaged Area Small Businesses

Dear Sir or Madam:

With regard to your solicitation for comments on the above Rules, we would make the following observations:

1. Any entity seeking certification under any of the programs should be required to execute all forms under oath and penalty of perjury. The integrity of the program requires accurate assessment of each applicant. Without accurate information, it will be impossible to prevent fronts, shams or other artificial entities from participating in the programs.

2. Under qualifcation for lacking adequate external support, (pg. 12-13 of the proposed rules) reference is made to normal terms, normal rates, and normal expectations. This is clearly a very subjective standard. The use of subjective terms such as normal, norm, and expectations should be replaced with some method of evaluating applicants based on objective standards.

   It is a fact of life for all businesses, no matter what their socio-economic status is that more favorable rates will be offered to customers that present less risk to bankers, insurers, or trade credit suppliers. American business, especially the construction industry, is based on calculated risk taking. We feel it will do little to further the interests of the targeted businesses to

artificially prop up their credit worthiness or bondability.

3. Under Rule 1230.1810(A), we would request that when a requisition is set aside for bidding solely by Certified disadvantaged small businesses, the following provision be added:

   (4) When three competitive bids are <u>not</u> received from certified socially disadvantaged small businesses, all bids received will be rejected and the requisition will be rebid without restriction.

4. In paragraph 1230.1820, Subp. 1(A) (1), we believe that full credit should be allowed for either type of subcontractor's contributions toward goal fulfillment. Using only 60% of a supplier's contribution artificially increases the requirement for a prime contractor to comply with the rules.

5. 1230.1820, Subp. 3(B), we believe that due to the nature of bidding for construction work, that 72 hours after the bid opening should be allowed for provision of documentation of efforts and steps taken to secure certified subcontractors.

6. 1230.1820, Subp. 4, we believe that prior to penalizing a prime contractor for failure to achieve a goal, an opportunity for a hearing should be provided. A due process notice and hearing procedure similar to the process employed when a certified entity is removed from eligibility lists should be a good starting point.

In conclusion, we would like to work with the department in the formulation of these rules. Please contact us when we can be of assistance.

Sincerely,

Todd M. Goderstad

Todd M. Goderstad
Building Division
Administrator

TMG/jkp

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 22, 1990

COMMENTS OF: Todd M. Goderstad

Building Division Administrator

AFFILIATION: Associated General Contractors of Minnesota

PHONE: 612/291-1102

STREET: Kellogg Square

111 E. Kellogg Boulevard, Suite 105

CITY: St. Paul

STATE: MN

ZIPCODE: 55101

PROPOSED RULES GOVERNING STATE CONTRACTS

STATEMENT RECEIVED via fax stamped 4:22p.m.

Re: Proposed Emergency Rules on Small, Targeted Small, and Economically Disadvantaged Area Small Businesses

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In conclusion, we would like to work with the department in the formulation of these rules. Please contact us when we can be of assistance.

WELLS ENGINEERS MINNESOTA, INC.

123 NORTH THIRD STREET
SUITE 712
MINNEAPOLIS, MINNESOTA 55401
(612) 332-6093

June 21, 1990

Department of Administration
Materials Management Division
50 Sherburne Avenue, Room #112
Attn: R. J. Baldwin
St. Paul, Minnesota 55155

RE: Notice of Solicitation of Outside Information or Opinions Regarding Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program

Dear Mr. Baldwin:

Please allow us to make some suggestions for implementation of this program:

Certification: The Department of Administration could adopt a grandfather clause and automatically certify those businesses certified as EDBs (Economically Disadvantaged Businesses).

If recertification is required, it should be kept simple. For example, a form could be sent to businesses asking to update their information (ie. address, staff size, prior year's gross receipts, etc) on an annual basis. In the case of a major change in an organization, the firm should be required to contact the Department of Administration. In this case it may be wise to ask the firm to submit a new application.

We feel that firms certified under this program should retain this status for a period of ten years. It takes most new companies three years to obtain a good book of business and another two years to reach the break-even point. After this initial five years, the company would need additional time to grow financially in order to expand and be able to compete with the older larger firms.

Participation: In the area of design/engineering services, we suggest that participation of Small, Targeted Small and Economically Disadvantaged Businesses be required for contracts over $200,000. In addition, identify certain smaller projects under $200,000 be set-aside strictly for these firms (similar to the Federal program). A small business may not have the ability to handle a contract over $200,000 but would gain valuable experience completing a specific task involved in it. On the other hand, it would be feasible for a small business to handle a contract under $200,000 and the company would gain experience in managing the entire project.

Goals: If it is the goal of the DOA to award 25% of all available funds to targeted businesses, we would suggest that a mix be used to meet this 25%. A breakdown dictated by the size of projects for the current year could be used. For example, 10% of the total could be used as set-aside contracts and the other 15% could be used on contracts over $200,000 requiring 6-10% small business involvement.

Incentives and penalties for fulfilling and not fulfilling a procurement program requirement should be strongly enforced. We would like to point out that the proposed incentive formula becomes a disincentive for any contract with a goal of less than 10%. The Contractor actually sees a penalty for giving DBE more than goal amount. Also, the qualification based selection process used for choosing consultants should include a point system preference for consultants using small businesses in a significant role on the project.

Publicity: A directory would be an effective way to list all the certified Small, Targeted Small and Economically Disadvantaged Businesses. This way larger firms that are not aware of how to fulfill a targeted business requirement on a project have a source to find one.

In the past the small business programs we have been involved in have been very successful for us. We look forward to participating in the Targeted Small Business Procurement Program.

Sincerely,

WELLS ENGINEERS MINNESOTA, INC.

Shirley M. Walker

Shirley M. Walker, P.E.
President

SMW/mw

ADDENDUM 1

PROPOSED SUBSTITUTE FOR DRAFT 2 DATED 5-17-90

1230.1820 - REQUIRED SUBCONTRACTING FOR CONSTRUCTION, CONSULTING OR PROFESSIONAL/TECHNICAL SERVICES

Subp 4. Incentives and Penalties:

Bid documents will state whether or not the incentive rule applies for the project being bid; if so,

A. Prime contractors who exceed the established goal on a given project for use of certified socially disadvantaged subcontractors by more than three percent may be awarded a financial incentive over and above the awarded bid price; such incentive award to be determined in the following manner:

1. Contracts qualifying for incentive clauses shall be prime contracts at $50,000.00 or higher in which the goal for subcontractor use has been set at 1% or higher. The minimum goal for contracts above $50,000 shall be 1%, which goal can be set higher, not to exceed 25%, or waived partially or entirely depending on the Divisions assessment of the availability, or non-availability, of responsible certified subcontractors for the project involved. Contracts between $2,000.00 and $50,000.00 may qualify for incentive clauses if the approved goal percentage applied to the estimated project cost will provide a minimum of $500.00 in potential subcontracting awards. The Division may also waive subcontracting goals for projects between $2,000 and $50,000.00 based on the Divisions assessment of available responsible certified subcontractors.

2. A monetary incentive over and above the awarded contract price shall be paid to the prime contractor upon documented proof of actual use of certified socially disadvantaged subcontractors on the project in excess of 3% of the goal set for that project. Such monetary incentive in any case shall not exceed 6% of the awarded project price or $60,000.00 at the maximum. The form of documented proof shall be specified in the award agreement.

3. The actual amount of incentive to be paid shall be calculated by the following formula:

   (a) Subtract the established goal + 3% from 25%.

   (b) Divide 6% of the project or $60,000.00 as appropriate by the number of percentage points in (a).

   (c) Multiply result in (b) by number of percentage points exceeding goal + 3%

4. The provisions of A. (1), (2), and (3) above shall be applicable to all prime contractors; and shall also apply to certified socially disadvantaged contractors acting as prime contractors if the awarded contract was not gained through preference or set-aside bidding procedures.

B. Prime contractors who have been awarded a contract and fail to meet the project goal for certified subcontractor use without approved waiver shall be penalized up to six percent of the total project value not to exceed $60,000.00. The penalty to be assessed will be proportionate to the actual underuse of certified subcontractors as compared to the project goal.

C. Prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low bidder shall have a penalty of up to six percent, not to exceed $60,000.00 added to their total project bid to determine responsible low bidder when other prime contractors have submitted bids that meet the specified targeted goal. The penalty to be added shall be proportionate to the under use determined in the bid proposal as compared to the announced project goal.

D. The Division reserves the right to cancel the request for bid or proposals and rebid the project when all bidders submit proposals which do not meet the announced goal and the evidence available to the Division indicates sufficient responsible certified subcontractors are willing and able to do the work.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

MATERIALS MANAGEMENT DIVISION

CUSTOMER & VENDOR SERVICES

DATE: June 21, 1990

COMMENTS OF: Shirley M. Walker, P.E.
President

AFFILIATION: WELLS ENGINEERS MINNESOTA, INC.

PHONE: 612/332-6093

STREET: 123 North Third Street
Suite 712

CITY: Minneapolis

STATE: MN

ZIPCODE: 55401

STATEMENT RECEIVED by letter June 21, 1990.

Re: Notice of Solicitation of Outside Information or Opinions Regarding Proposed Emergency Rule Governing the State of Minnesota Small, Targeted Small, and Economically Disadvantaged Area Small Business Program

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(12.) NOTICE OF SUBMISSION TO ATTORNEY GENERAL; NONE RECEIVED

NOT APPLICABLE

(13.) AFFIDAVIT OF MAILING THE NOTICE OF SUBMISSION; NOT APPLICABLE

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Emergency Rule Amendments Relating to the Small Business Procurement Program

DECLARATION OF COUNSEL

I, Martha J. Casserly, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rule, and the supporting rulemaking record, and that, based on my examination, the Administrative Procedure Act and Minnesota Rules, chapter 2010 have been followed. Any exceptions are listed below. For Attorney General billing purposes, the four-digit docket client code is 0005.

Martha J. Casserly

MARTHA J. CASSERLY
Special Assistant
Attorney General

Dated: September 12, 1990.