

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

DEPARTMENT: Office of the Attorney General

STATE OF MINNESOTA

OFFICE MEMORANDUM

DATE: July 11, 1991

TO: ROBERT BALDWIN
Materials Management Division
50 Sherburne

FROM: MARY JO MURRAY
Special Assistant Attorney General
525 Park Street, Suite 500 (55103)

PHONE: 296-3258

SUBJECT: In the Matter of the Adopted Rule Relating to Business

The above-referenced rule has been approved as to its legality by the Attorney General on July 10, 1991.

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 the 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.

MJM:sc
Enclosures
cc: Charlene Hatcher
William Brown, Chief Judge
MaryAnn Hruby

Department of Administration

Adopted Permanent Rules Relating to Business

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.

1230.0150 DEFINITIONS.

Subpart 1. **Scope.** Within parts 1230.0100 to 1230.1910, the following apply, unless clearly indicated otherwise by the context.

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. 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 contractor, subcontractor, supplier, consultant, or provider of technical, administrative, or physical services organized as a sole proprietorship, partnership, association, corporation, or other entity formed for the purpose of doing business for profit.

Subp. 5. **Contractor.** "Contractor" means a business that

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is engaged in construction such as general, mechanical, 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 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 a contract by a governmental body, for a specified 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 Materials Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means an operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, that does not provide the operator with the exclusive right to profit from the operator's 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~~ 26 and part 1230.1700, subparts 5, item C, and 5a, items A to F.

Subp. 11. **Joint venture.** "Joint venture" means the temporary association of two or more businesses to secure and fulfill a procurement bid award. For awards under the preference or set-aside provisions of the small business procurement program in parts 1230.1400 to 1230.1910, all parties in the joint venture must be certified as targeted groups or

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economically disadvantaged area businesses.

Subp. 12. **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. 13. **Manufacturer.** "Manufacturer" means a business that makes or processes raw materials into a finished product.

Subp. 14. **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. 15. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions that allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 16. **Open market.** "Open market" means purchases made in the marketplace without the need for competitive bids.

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

Subp. 18. **Principal place of business.** "Principal place of business" means the primary 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 on which debarment ends by submitting an application to the director. If a debarred vendor is restored to the state bidders lists, the vendor will be subject to a one-year probationary period.

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

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

B. if services are to be provided, has the necessary

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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 a contract as evidenced by the ability to obtain bonding when required; and

D. has no unresolved 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, or operated under false names or fronts as a small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota, as evidenced by timely filing of all required returns, reports, payments, and possession of all applicable stamps, licenses, or other permits, and freedom from any judgment, lien, or seizure of assets or property to satisfy tax payments or duties; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G within 30 days or less or within a reasonable amount of time determined by prior consensus between the bidder and the division.

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

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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 exceed six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means 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.** The terms in items A to C have the meanings given them for purposes of administering the small business procurement program.

A. "Racial minority" means persons in one or more of the categories in subitems (1) to (5).

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

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

(5) "Indian" means persons having origins in any of the original peoples of North America who are enrolled members of Indian tribes recognized by the governments of the United States and Canada.

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

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C. ~~"Persons who have suffered a substantial physical disability" means 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 the person's major life activities.~~ "Disabled" means any condition or characteristic that renders a person a disabled person. A disabled person is any person who:

(1) has a physical, sensory, or mental impairment which materially limits one or more major life activities;

(2) has a record of such an impairment; or

(3) is regarded as having such an impairment.

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 an individual, partnership, corporation, joint venture, association, or cooperative that is 51 percent owned and is operationally controlled on a day-to-day basis by citizens of the United States.

1230.0300 SOLICITING BIDS.

Subpart 1. **Publication.** Any purchase estimated to exceed the limits established by Minnesota Statutes, section 16B.07, subdivision 3, shall be purchased on sealed bids, notice of solicitation of bid will be advertised at least seven days prior to the bid opening date. Bids shall also be solicited by sending bid invitations to prospective bidders registered with the division pursuant to subpart 3.

Subp. 2. **Open market.** Any purchase estimated to be less than the limits established by Minnesota Statutes, section 16B.07, subdivision 4, may be made upon competitive bids or in the open market.

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Subp. 3. **List of bidders.** A list of bidders shall be maintained by the division for various commodities and services. Persons desiring to sell commodities or provide services to the state may request a vendor registration application. Upon approval of the application by the division as meeting the requirements in part 1230.0150, subpart 20, the vendor's name shall be placed on appropriate bid lists to receive invitations to bid. The name of a vendor who fails to respond to three consecutive bid invitations will be removed from the lists of bidders. The name of the vendor so removed will be restored only through specific written request from the vendor.

1230.0400 SUBMISSION OF ADVERTISED BIDS.

Subpart 1. [See repealer.]

Subp. 2. **Bid conditions.** General bid conditions applicable to all state purchases shall be stated on the standard invitation to bid. Special bid conditions applicable to specific commodities or types of purchase shall be stated in the invitation to bid. In the event of conflict between general bid conditions and special bid conditions, the special bid conditions will govern.

Subp. 3. [See repealer.]

1230.0500 BID SECURITY.

Subpart 1. **Payment.** Each bid invitation shall set forth the bid security required by the division, if any. Such bid security shall be made payable to "State of Minnesota" and shall be made upon the condition or guarantee that in the event the bidder's offer is accepted, the bidder shall enter into contract in accordance with the proposal.

Subp. 2. **Forfeit.** Certified checks or bid bonds of successful bidders shall constitute liquidated damages for failure of a bidder to enter into a contract, and shall also be held as security for delivery and acceptance of merchandise, or satisfactory completion of the contract. A performance bond for 25 percent of the award may be substituted.

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Subp. 3. **Return.** Bid security checks of unsuccessful bidders shall be returned to vendor by placing them in the mail within five working days after an award is made. Bid security checks of successful vendors shall be returned as soon as delivery is completed and acceptance is made by the agency, or the contract is satisfactorily completed. No interest shall be paid on any money held as security.

Subp. 4. **Annual bid and supply bond.** Bidders may file with the director an annual bid and supply bond in lieu of individual bonds or other security required in various individual bid invitations. Annual bid and supply bonds, when accepted by the director, shall cover all bids by the vendor for materials, commodities, and supplies during the effective period of the annual bond, except as provided in subpart 5. The vendor shall be notified in writing if the necessity arises to attach the bond for breach of contract.

Subp. 5. **Bids excluded from annual bid and supply bonds.** Annual bid and supply bonds shall not cover bids:

A. for building construction, repair, remodeling, or other public works;

B. on which the annual bid security does not amount to five percent of the bid;

C. when another bond is required by specification; or

D. when bond is used as security on other bids.

1230.0600 BIDDER ERRORS.

Prior to the opening of sealed bids, any person may withdraw a bid by notifying the director in writing of the desire to withdraw, by appearing in person at the division office and withdrawing the bid, or by telegraphic writing or facsimile received by the director requesting withdrawal of the bid.

Subsequent to the opening of sealed bids, a person may withdraw a bid only upon a showing that an obvious error exists in the bid. The showing and request for withdrawal must be made in writing to the director within a reasonable time after the

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opening of the bids and prior to the state's detrimental reliance on the bid.

1230.0700 OPENING OF BIDS.

Subpart 1. **Division's treatment of bids.** Upon receipt in the division, all bids will be time stamped, showing the date and hour received. Bids received after the time set for the opening of bids will be returned unopened to the bidders. Bids shall be opened publicly and read aloud at the time and place established in the bid invitation.

Subp. 2. [See repealer.]

Subp. 3. **Rejection of bids.** The state may reject any or all bids or portions thereof. All bids shall be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, or insufficient state funds. A vendor whose sealed bid is rejected shall be given notice of the rejection and the reason(s) for rejection of the bid.

Subp. 4. **Informalities and minor deficiencies.** The state reserves the right to waive minor deficiencies or informalities in bids. Minor informalities shall be waived if, in the judgment of the director, the best interest of the state would be served without prejudice to the rights of the other bidders. Examples of minor deficiencies include, but are not limited to, omission of the title of the signatory; failure to furnish required catalog cuts; and minor detail omissions.

1230.0900 TIED BIDS.

Subpart 1. **Resolving tied bids.** Tied low bids for less than $500 shall be resolved by drawing lots among the tied low bidders, except as provided in subpart 2.

Except as provided in subpart 2, tied low bids for $500 or more shall be referred to the director for disposition. The director may enter into negotiation with tied low bidders when the director deems such action to be in the best interest of the state.

Subp. 2. **Preference for Minnesota firms.** Whenever a tie

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involves a Minnesota firm and one whose place of business is outside the state of Minnesota, preference shall be given to the Minnesota firm.

1230.1000 CONTRACT PERFORMANCE.

Subpart 1. **Shipment.** The director or authorized agents of state departments shall place orders with successful bidders using official state purchase orders. Upon award, shipment shall be made in accordance with delivery instructions in the invitation to bid.

Subp. 2. **Inspection.** The state may require that the vendor permit inspection of the commodities prior to shipment at the factory, plant, or establishment where produced, manufactured, or stored. Unless provision for inspection is made in the invitation to bid, costs thereby incurred will be paid by the state.

Subp. 3. **Grounds for rejection.** All deliveries shall conform to specifications of the bid. Failure in this respect shall be cause for rejection of the goods. Commodities that fail to comply with specifications, fail to conform to the vendor's sample, are not as provided on the purchase order, or arrive in an unsatisfactory condition shall be rejected except as provided in subpart 7.

Subp. 4. **Notice of rejection.** Notice of rejection, based upon apparent deficiencies disclosed by ordinary methods of inspection, shall be given by the receiving agency to both vendor and the carrier (if f.o.b. shipping point) within reasonable time after delivery, with a copy of this notice to the division. A revocation of acceptance for latent deficiencies that would make the items unsatisfactory for the purpose intended shall be given by the state within reasonable time after discovery. The contractor shall satisfactorily repair or replace such items within a reasonable time.

Subp. 5. **Removal of rejected items.** The vendor shall remove at the vendor's expense any item rejected by the state. If the vendor fails to remove the items and instead forwards

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shipping instructions to the agency concerned, the state need not comply, but may sell the item and remit the proceeds of sale, less the expense involved, in accordance with law, including but not limited to, Minnesota Statutes, section 336.2-603.

Subp. 6. **Replacing rejected items.** If the needs of a state agency do not permit time to replace rejected merchandise, or if deliveries are not made within the time specified in the contract, the agency may, with the approval of the director, buy on the open market supplies of the nature required. The vendor shall be liable for all additional costs and expenses.

Subp. 7. **Adjusting price of nonconforming items.** If it is determined that an item does not conform strictly to specifications, but can be used satisfactorily, the director, with written acquiescence of the vendor, may adjust the price and authorize the agency to keep and use such part of the order when such action is required to sustain continued operation.

Subp. 8. **Laboratory tests.** The director may require that a laboratory analysis or other tests be made to determine the acceptability of the delivered product(s) and to ensure that those product(s) meet specifications. When analyses or tests are required, acceptance by the state shall not occur nor be deemed to have been made until testing is completed and affirmative results are obtained. Any discount time applicable shall begin after affirmative results are obtained. Vendors shall be notified of unsatisfactory test results.

1230.1100 FAILURE TO PERFORM.

Subpart 1. **Penalties.** If a bidder who is awarded a contract fails to perform as specified, the bid security as described in part 1230.0500, subpart 1, shall be retained by the state and deposited with the state treasurer as liquidated damages. The vendor may also be determined not to be a responsible bidder. The state may also pursue all other remedies permitted by rule or provided by law.

If the bid security is in the form of a bond, the bonding

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company shall be notified in writing of the default. A vendor who fails to enter into contract that has been awarded to him may be determined not to be a responsible bidder regardless of whether bid security was required. The state may seek further damages and shall not be limited by the absence or existence of a bond. In all cases of default, the vendor may be determined not to be a responsible bidder.

Subp. 2. **Failure to furnish security.** After the award of a contract, if performance security is required and the vendor fails to furnish satisfactory performance security, the vendor shall be considered in default and subject to subpart 1 ~~and this subpart~~.

Subp. 3. **Types of failure to conform to specifications.** A vendor shall be held in default for failure to conform to bid specifications or standard commercial practices including, but not limited to the following:

A. failure to make deliveries within the time specified in the contract; or

B. deliveries of goods or materials that do not conform to samples or specifications; or

C. delivery of goods or materials that are rejected; or

D. misbranding or materially misrepresenting goods or materials purchased under the contract.

1230.1150 AUTHORITY TO DEBAR OR SUSPEND VENDORS.

Subpart 1. **Suspension.** After written notice to the person involved and providing for a reasonable opportunity for that person to be heard, the director shall have the authority to suspend a person from consideration for awards of contracts ~~for a minimum of one year~~ if the director determines that the person has engaged in an activity that might lead to debarment.

Subp. 2. **Debarment causes.** A vendor shall be debarred if one or more of the following occurs:

A. conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or

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private contract or subcontract, or in the performance of the contract or subcontract;

B. conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor;

C. conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation of contract provisions, as set forth in subitems (1) and (2), of a character that is regarded by the director to be so serious as to justify debarment action:

(1) failure without good cause to perform according to the specifications or within the time limit provided in the contract; or

(2) a recent record of failure to perform, or of unsatisfactory performance, according to the terms of one or more contracts; provided that this failure to perform or unsatisfactory performance was not caused by acts beyond the control of the contractor; or

E. any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including, but not limited to, collusion with other bidders to restrain competitive bidding, giving false information on a bidder's application, and all acts that would disqualify the person as a responsible bidder, as defined in part 1230.0150, subpart 20, including debarment by another governmental entity.

In the case of debarment by other governmental entities, should that debarment result from action by the federal government, the state of Minnesota, or any of its departments, commissions, or agencies, or any of its political subdivisions, the terms and limits of that debarment are automatically effective for parties so debarred in doing business with the division. Debarments by other governmental entities are cause

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for suspension until a determination can be made by the division under normal suspension procedures as to whether the debarment applies under Minnesota statutes and rules.

Subp. 3. **Written notice.** A written notice to debar or suspend shall be furnished to the affected parties and shall:

A. state the reasons for the action taken;

B. give the length of time the vendor will be debarred; and

C. inform the debarred or suspended person of the person's rights to administrative and judicial review according to subpart 4.

Subp. 4. **Suspension or debarment appeals.** If suspended or debarred, a person may file an appeal in writing with the commissioner of administration within 30 days of receipt of a decision to suspend or debar. The commissioner shall, within 45 days, decide whether the actions taken were according to statutes and regulations and were fair and in the best interest of the state.

Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

Subp. 5. **Length of debarment.** A bidder may be debarred from receiving and submitting bids for not less than one year, nor more than three years. The length of the debarment will depend on the vendor's past performance, the number and seriousness of the current complaints, and the cost to the state associated with correcting the problem.

Subp. 6. **Public list of debarred.** The division shall maintain a master list of all suspensions and debarments. The master list will retain all information concerning suspensions and debarments as a public record. The records will be maintained for at least three years following the end of a suspension or debarment. Such public information may be considered in responsible bidder determinations according to part 1230.0150, subpart 20.

1230.1175 REINSTATEMENT AND PROBATION.

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Subpart 1. **Review of reinstatement applications.** The director will review vendor applications for reinstatement.

Subp. 2. **Application for reinstatement time limits.** A person who has been debarred may not seek reinstatement until one year from the end of the debarment period.

Subp. 3. **Information in reinstatement application.** A request for reinstatement must be made to the director in writing and include:

A. all information necessary to qualify as a responsible bidder, as defined in part 1230.0150, subpart 20;

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

C. 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

D. a written narrative outlining all steps taken to ensure that the cause for debarment has been corrected with appropriate supporting documentation.

Subp. 4. **Actions following decision.** The director will determine if the person can be reinstated as a responsible bidder and be added to the bidders list. If, after investigation, the petitioner's request for reinstatement is denied, the person cannot reapply for reinstatement for one year from the date of denial. If reinstated, the petitioner will be placed on the bidders list and be subject to a one-year probationary period.

Subp. 5. **Probationary periods and conditions.** Vendor probationary periods apply to formally debarred persons who have been reinstated as responsible bidders.

The length of the probationary period will be one year from the date of reinstatement.

During the probationary period, the party on probation must respond to all bid requests received from the division.

If a bid from a vendor on probation is accepted and the

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vendor refuses to perform or enters into a contract and performance is substandard, the performance or supply bond, if any, will be retained and the vendor will be deemed not to be a responsible bidder and will be permanently removed from the list of bidders.

1230.1200 CONTRACT CANCELLATION.

The director may cancel a purchase entered into under competitive bidding under any one of the following conditions including, but not limited to:

A. the contractor agrees to the cancellation;

B. the contractor has obtained the contract by fraud, collusion, conspiracy, or in conflict with any statutory or constitutional provision of the state of Minnesota;

C. failure to deliver as agreed; or

D. failure to deliver within the time period stated in the invitation to bid.

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.

1230.1450 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern. The definitions contained in part 1230.0150 shall apply in the administration of these preference programs.

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

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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

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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~~ for the purposes of this program.

(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

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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 owned by socially disadvantaged persons as defined by the Minnesota Department of Administration rules, part ~~1230.1550~~ 1230.0150, 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~~ 1230.0150, 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,

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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

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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):

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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

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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~~ note 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

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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

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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~~ 6.

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

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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

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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 and expertise 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

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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

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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

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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.

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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

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establishing qualifications for certification. The commissioner shall, if time permits, 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.

1230.1805 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.

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(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~~ the specified 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~~ the specified 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 will depend 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:

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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

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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 director or the director's designee. The director may uphold, modify, or reject the penalty. The decision of the director may be

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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 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~~ the specified 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~~ the specified 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~~ bids by the certified small ~~business~~ businesses.

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 as specified in parts 1230.1000 and 1230.1100.

Subp. 2. **Reinstatement.** An otherwise eligible business that was removed from the the bid list under ~~this~~ subpart 1 may apply for reinstatement and participation in the preference program according to part 1230.1175.

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~~ the programs 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 certified directory under subpart 3, the business may

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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 certified directory was reasonable and whether the removal is in compliance with subpart 3. 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 to the 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

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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

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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~~ therefore. 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

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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 parts 1230.1000 and 1230.1100. 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 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

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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

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or economically disadvantaged area persons established in part 1230.0150, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.0200; 1230.0400, subparts 1 and 3; 1230.0700, subpart 2; 1230.1500; 1230.1700, subparts 2 and 3; 1230.1800; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300, are repealed.

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by Revisor _____

APPROVED AS TO FORM AND LEGALITY

10 19 91

HUBERT H. HUMPHREY, III
ATTORNEY GENERAL

BY _____
SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUL 11 1991
Joan Anderson Growe
Secretary of State

4:00 P.M.

M

MJM

RULE REVIEW CHECKLIST

File No. 1838
DATE RECEIVED 6-28-91
REVIEW DATE July 7th 1991
DUE DATE July 12, 1991
~~(DIS)~~APPROVED July 10, 1991
~~WITHDRAWN~~

Docket No. 05 0009 0005
ADOPTED W/O HEARING
EMERGENCY RULE
TO REVISOR ON 6-27-91
REVISOR (DIS)APPROVED 6-28-91
FILED W/SEC. OF STATE 1-10-91
RETURNED TO AGENCY

✓ Rule as adopted (4 copies)

✓ Notice to Solicit Outside Information/Opinion (if applicable)
January 28, 1991 Date published in State Register
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.04, 16B.18, 16B.19 Statutory Authority 16B.22
✓ Small Business Statement — Amended 3-29-91 to include statement
Expenditure of public money statement
~~March 15, 1991~~ Signature

✓ Statement of Need and Reasonableness (if applicable)
✓ Small Business Statement
N/A Fees - § 16A.128

✓ Affidavit of Mailing Notice of Intent to Adopt Rule
April 1, 1991 Dated 30/25 days before adoption and April 4, 1991
✓ Notice attached indicates it is attached
Copy of rule or summary attached

✓ Publication in State Register
April 1, 1991 Date 30/25 days before adoption April 8, 1991

✓ 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)

~~Resolution Adopting~~
Date adopted

✓ Findings of Fact, Conclusions & Order Adopting
June 24, 1991 Date

✓ Written Requests, Submissions or Comments

✓ Declaration of Attorney
Charlene Hatch Name of SAAG representing agency

Notice of Submission to Attorney General (if applicable)

Affidavit of Mailing Notice to Attorney General (if applicable)

Attorney General

Proposed Permanent Rules Relating to Rule Review

Rules as Proposed

2010.0300 DOCUMENTS NECESSARY FOR REVIEW OF A RULE ADOPTED WITHOUT A PUBLIC HEARING.

To submit a rule adopted without a public hearing to the attorney general for review and approval pursuant to Minnesota Statutes, section 14.26, the agency must submit to the attorney general the following documents:

[For text of items A to D, see M.R.]

E. The statement of need and reasonableness in support of the proposed rule in compliance with part 2010.0700. The statement of need and reasonableness must be prepared before the date that the notice of intent to adopt a rule without a public hearing is published in the State Register and mailed.

F. A copy of the dated correspondence to the Legislative Commission to Review Administrative Rules enclosing a copy of the statement of need and reasonableness when the statement becomes available to the public.

G. The notice of intent to adopt a rule without a public hearing as mailed. The notice ~~must be signed by a person authorized to adopt the rule or authorized to sign and give notice of the intent to adopt the rule without a public hearing~~ and must contain the following:

(1) A statement that the agency intends to adopt a rule without a public hearing pursuant to the authority of [citation to the specific statutory authority for the proposed rule] and is following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in Minnesota Statutes, sections 14.22 to 14.28.

(2) A statement that the public has 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the proposed rule and

that comment is encouraged. The statement must specify the calendar date of the last day of the comment period. In calculating the comment period, the date of publication in the State Register is not included. Saturdays, Sundays, and legal holidays are included in the calculation. The last day of the period so calculated is included unless it is a Saturday, Sunday, or legal holiday, in which event, the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(3) A statement that each comment should identify the portion of the proposed rule addressed, the reason for the comment and any change proposed.

(4) A statement that if 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing.

(5) A statement of the manner in which persons may submit comments or requests for a public hearing.

(6) A statement that any person requesting a public hearing ~~should~~ must ~~state~~ include his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed.

(7) A statement that if a public hearing is required, the agency will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

(8) A statement that the proposed 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 rule as noticed.

(9) A statement that if no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the attorney general for review as to legality and form to the extent form relates to legality; a statement that any person may request notification of the date of submission to the attorney general; and a statement of the manner in which the request must be made.

(10) If an entire rule is proposed to be repealed, a statement stating that fact and citing the rule to be repealed.

(11) A statement that the proposed rule is attached to the notice; or if the proposed rule is not attached to the notice sent to persons on the agency rulemaking mailing list, a statement describing the nature and effect of the proposed rule and the manner in which a free copy may be requested.

(12) A statement that the statement of need and reasonableness is available to the public and the manner in which that document may be requested.

(13) If required by Minnesota Statutes, section 14.11, subdivision 1, a statement relating to the expenditure of public money by local public bodies.

(14) If the agency elects to comply with Minnesota Statutes, section 14.115, subdivision 4, by following paragraph (a) of the statute, a statement that the proposed rule will have an impact on small businesses and a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons as provided by Minnesota Statutes, section 14.115, subdivision 4, paragraph (a).

(15) Any other notices required by law or rule to be included in the notice of intent to adopt a rule without a public hearing.

(16) The signature of the person authorized to adopt the rule or authorized to sign and give notice of the intent to adopt the rule without a public hearing.

For the recommended format of the notice, see part 2010.9915.

~~F.--The-statement-of-need-and-reasonableness-in support-of-the-proposed-rule-complying-with-part-2010.0700.~~

~~G.~~ H. If the rule establishes or adjusts fees, a copy of the dated notice or correspondence to the chairs of the house appropriations and senate finance committees pursuant to

Minnesota Statutes, section 16A.128, subdivision 2a.

I. If the agency did not publish an appropriate notice of intent to adopt within 180 days after the effective date of the law requiring rules to be promulgated, a copy of the correspondence to the Legislative Commission to Review Administrative Rules, other appropriate committees of the legislature, and the governor pursuant to Minnesota Statutes, section 14.12.

J. The affidavit of mailing the notice of intent to adopt a rule without a public hearing. The notice must be mailed at least three days before the notice is published in the State Register. The affidavit or affidavits must state that:

(1) the mailing list maintained by the agency pursuant to Minnesota Statutes, sections 14.22 and 14.14, subdivision 1a is accurate, complete, and current ~~and that~~;

(2) the notice of intent to adopt the rule without a public hearing was mailed to all persons and groups whose names appear on the list; and

(3) a copy of the statement of need and reasonableness was sent to the Legislative Commission to Review Administrative Rules when the statement became available to the public. If the person who mailed the notice or statement of need and reasonableness is not the same person who can attest to the accuracy of the mailing list, separate affidavits signed by the appropriate person must be submitted. For the recommended format of the affidavit, see part 2010.9920.

~~H.~~ K. A copy or photocopy of the notice of intent to adopt the rule without a public hearing as published in the State Register. The notice as published must contain the statements required by part 2010.0300, item E.

~~I.--Four~~ L. Three copies of the rule as adopted. Any modification made to the proposed rule must be reflected on the rule as adopted and be approved as to form by the revisor of statutes.

~~J.~~ M. If the agency is a multimember agency as provided in Minnesota Statutes, section 15.0597, subdivision 1a,

the certificate of the multimember agency's resolution adopting the rule. The resolution must be adopted at a meeting duly called and attended by a quorum.

The resolution must approve and adopt the rule and authorize a named individual to sign findings of fact, conclusions, and order adopting the rule and perform the necessary acts to provide that the rule has the force and effect of law. If the multimember agency is so empowered, the resolution may also authorize the named person to modify the rule under stated circumstances or as necessary to obtain the approval of the rule by the attorney general. For the recommended format of the resolution, see part 2010.9925.

~~K.~~ N. The findings of fact, conclusions, and order adopting the rule which must contain the following:

(1) a statement that proper notice of intent to adopt a rule without a public hearing was given;

(2) a statement that the statement of need and reasonableness was prepared before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the rulemaking mailing list and published in the State Register and was available to the public;

(3) for rules that establish or adjust fees, a statement that before the notice of intent to adopt rules was submitted to the State Register, a copy of the notice and the proposed rule was sent to the chairs of the house appropriations committee and senate finance committee;

(4) a statement that all persons were given the opportunity to submit comment on the proposed rule for 30 days after the notice of intent to adopt a rule without a public hearing;

(5) a statement of the number of written comments received, the number of persons that requested a public hearing ~~and~~, the number of persons that requested a public hearing and withdrew their request, and the number of requests for notice of submission to the attorney general;

(6) if any changes were made between the rule as

proposed and the rule as adopted, findings of fact and conclusions supporting the reasons for the changes and explaining why the changes do not constitute substantial changes as provided in the attorney general rules, part 2010.1000, item D;

~~(7) if the agency received no requests for a hearing, or received no submissions or comments on the rule required to be submitted to the attorney general by item b, or received no requests for notice of submission of the adopted rule to the attorney general, an applicable statement to that effect, and~~

~~(8)~~ a statement that the rule as adopted is needed and reasonable and that the rule is hereby ordered to be adopted; and ~~the date on which the order is signed.~~

~~The findings of fact, conclusions, and order adopting the rule must be signed by a person authorized to adopt the rule or authorized to sign the findings of fact, conclusions, and order adopting the rule.~~

(8) the signature of the person authorized to adopt the rule or authorized to sign the findings of fact, conclusions, and order adopting the rule and the date on which the order is signed.

For the recommended format of the findings of fact, conclusions, and order, see part 2010.9930.

~~b.~~ O. All written requests, withdrawals of requests for a hearing, submissions, or comments on the rule received by the agency except requests solely for copies of the rule or of the statement of need and reasonableness.

~~m.~~ P. The declaration of the attorney in the attorney general's office who represents the agency. The declaration must state:

(1) that the attorney has examined the rule and the rulemaking record;

(2) that the Administrative Procedure Act and chapter 2010 have been followed with a listing of any exceptions; and

(3) for attorney general billing purposes, the four-digit docket client code is ____. For the recommended format, see part 2010.9935.

~~N.~~ Q. The notice of submission of the rule to the attorney general, if applicable. If any persons requested notification of the date of submission of the rule to the attorney general, the notice must be given on the same day the rule is submitted to the attorney general. The notice must contain the following:

(1) the date of submission of the rule to the attorney general;

(2) if the proposed rule has been modified, the notice must state that fact and must state that a free copy of the rule as modified is available upon request from the agency or that a copy of the rule as modified is enclosed with this notice;

(3) the attorney general rule review time period;

(4) a statement that comments may be submitted to the attorney general and that any comments submitted must address only the issue of legality of the rule or the legality of the specific parts or subparts of the rule and make a reference to the attorney general standards of review as set forth in part 2010.1000;

(5) the length of the comment period and the calendar date of the last day of the comment period. In calculating the comment period, the date the documents were submitted to the attorney general is not included. Saturdays, Sundays, and legal holidays are included. The last day of the period so calculated is included unless it is a Saturday, Sunday, or legal holiday, in which event, the period runs until the next day which is not a Saturday, Sunday, or legal holiday;

(6) a statement that upon written request to the attorney general a copy of the attorney general decision will be provided;

(7) the address of the attorney general division where comments and requests must be submitted; and

(8) a statement that any written comments to the attorney general must also be submitted simultaneously to a named person for the agency and the address of that person.

For the recommended format of the statement, see part 2010.9940.

~~Q.~~ R. The affidavit of mailing notice of submission of the rule to the attorney general, if applicable. The affidavit must state that a copy of the notice of submission of the rule to the attorney general was mailed to all persons and associations who requested the notification. For the recommended format of the affidavit, see part 2010.9945.

2010.0400 DOCUMENTS NECESSARY FOR REVIEW OF EMERGENCY RULE.

To submit an emergency rule to the attorney general for review and approval pursuant to Minnesota Statutes, section 14.32, the agency must submit to the attorney general the following documents:

[For text of items A to D, see M.R.]

E. The notice of intent to adopt the emergency rule as mailed. The notice ~~must be signed by a person authorized to adopt the rule or authorized to sign and give notice of the intent to adopt the emergency rule and~~ must contain the following:

(1) A statement that the agency intends to adopt the emergency rule pursuant to authority of [citation to the specific statutory authority to adopt the emergency rule] and 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) A statement that all persons have 25 days after publication~~, or a longer period of time as specified in the notice,~~ to submit data and views on the proposed emergency rule or any part or subpart of the rule in writing. The statement must include the calendar date of the last day of the comment period. In calculating the comment period, the date of the publication in the State Register is not included.

Saturdays, Sundays, and legal holidays are included in the calculation. The last day of the period so calculated is included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(3) A statement of the manner in which persons may submit written comments to the agency.

(4) A statement that the proposed emergency rule is attached to the notice; or, if the proposed rule is not attached to the notice sent to persons on the agency rulemaking mailing list, a statement describing the nature and effect of the proposed rule.

(5) A statement that a free copy of the proposed emergency rule is available upon request from the agency and the manner in which the request may be made.

(6) A statement that 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) A statement that the emergency rule and its supporting documents will be submitted to the attorney general for review as to legality and form to the extent form relates to legality; a statement that any person may request notification of the date of submission to the attorney general; and a statement of the manner in which the request must be made.

(8) A statement of the effective period of the proposed emergency rule in accordance with Minnesota Statutes, section 14.35.

(9) If required by Minnesota Statutes, section 14.11, subdivision 1, a statement relating to the expenditure of public money by local public bodies.

(10) Any other notices required by law or rule to be included in the notice of intent to adopt an emergency rule.

(11) The signature of the person authorized to adopt the emergency rule or authorized to sign and give notice of the intent to adopt the emergency rule.

For the recommended format of the notice, see part 2010.9950.

F. If the emergency rule establishes or adjusts fees, a copy of the dated notice or correspondence to the chairs of the house appropriations and senate finance committees pursuant to Minnesota Statutes, section 16A.128, subdivision 2a.

G. The affidavit of mailing the notice of intent to adopt the emergency rule. The notice must be mailed at least three days before the notice is published in the State Register. The affidavit or affidavits must state that the mailing list maintained by the agency pursuant to Minnesota Statutes, section 14.30 is accurate, complete, and current and that the notice of intent to adopt the emergency rule was mailed to all persons and groups whose names appear on the list. If the person who mailed the notice is not the same person who can attest to the accuracy of the mailing list, separate affidavits signed by the appropriate person must be submitted. For the recommended format of the affidavit, see part 2010.9920.

~~G.~~ H. A copy or photocopy of the notice of intent to adopt the emergency rule as published in the State Register. The notice as published must contain the statements required by part 2010.0400, item E.

~~H.--Four~~ I. Three copies of the emergency rule as adopted. Any modifications made to the proposed rule must be reflected on the rule as adopted and be approved as to form by the revisor of statutes.

~~I.~~ J. If the agency is a multimember agency as provided in Minnesota Statutes, section 15.0597, subdivision 1a, the certificate of the multimember agency's resolution adopting the emergency rule. The resolution must be adopted at a meeting duly called and attended by a quorum.

The resolution must approve and adopt the rule and authorize a named individual to sign findings of fact, conclusions, and order adopting the rule and perform the necessary acts to provide that the emergency rule has force and effect of law. If the multimember agency is so empowered, the

resolution may also authorize the named person to modify the rule under stated circumstances or as necessary to obtain approval of the rule by the attorney general. For the recommended format of the resolution, see part 2010.9925.

~~J.~~ K. The findings of fact, conclusions, and order adopting the emergency rule which must contain the following:

(1) a statement that proper notice of intent to adopt a rule was given;

(2) a statement that all persons were given the opportunity to submit written comment for at least 25 days after publication of the notice of intent to adopt the emergency rule;

(3) if any changes were made between the emergency rule as proposed and the emergency rule as adopted, findings of fact and conclusions supporting the reasons for the changes and explaining why the changes do not constitute substantial changes as provided in attorney general rule part 2010.1000, item D;

(4) ~~if the agency received no submissions or comments on the rule required to be submitted to the attorney general pursuant to item K, or received no requests for~~ a statement of the number of written comments received and the number of requests for notice of submission of the adopted emergency rule to attorney general~~, an applicable statement to that effect~~; and

(5) a statement that the emergency rule is hereby ordered to be adopted and the signature of the person authorized to adopt the emergency rule or authorized to sign the findings of fact, conclusions, and order adopting the emergency rule and the date on which the order is signed.

~~The findings of fact, conclusion, and order adopting the emergency rule must be signed by a person authorized to adopt the emergency rule or authorized to sign the findings of fact, conclusions, and order adopting the emergency rule.~~ For the recommended format of the findings of fact, conclusions, and order, see part 2010.9955.

~~K.~~ L. All written requests, submissions, and comments

on the rule received by the agency except requests solely for copies of the rule.

~~L.~~ M. The declaration of the attorney in the attorney general's office who represents the agency. The declaration must state:

(1) that the attorney has examined the rule and the rulemaking record;

(2) that the Administrative Procedure Act and chapter 2010 have been followed with a listing of any exceptions; and

(3) for attorney general billing purposes, the four-digit docket client code is ____. For the recommended format, see part 2010.9935.

~~M.~~ N. The notice of submission of the emergency rule to the attorney general, if applicable. If any persons requested notification of the date of submission of the emergency rule to the attorney general, the notice must be mailed on the same day the rule is submitted to the attorney general. The notice must contain the following:

(1) the date of submission of the emergency rule to the attorney general;

(2) if the proposed emergency rule has been modified, the notice must state that fact and must state that a free copy of the emergency rule as modified is available upon request from the agency or that a copy of the rule as modified is enclosed with this notice;

(3) the attorney general rule review time period;

(4) a statement that comments may be submitted to the attorney general and that any comments submitted must address only the issue of legality of the rule or the legality of the specific parts or subparts of the rule and make a reference to the attorney general standards of review as set forth in part 2010.1000;

(5) the length of the comment period and the calendar date of the last day of the comment period. In calculating the comment period, the date the documents were

submitted to the attorney general is not included. Saturdays, Sundays, and legal holidays are not included in the calculation. The last day of the comment period so calculated is included;

(6) a statement that upon written request to the attorney general a copy of the attorney general decision will be provided;

(7) the address of the attorney general division where comments and requests must be submitted; and

(8) a statement that any written comments to the attorney general must also be submitted simultaneously to a named person for the agency and the address of that person.

For the recommended format of the statement, see part 2010.9960.

~~N.~~ O. The affidavit of mailing the notice of submission of the emergency rule to the attorney general, if applicable. The affidavit must state that a copy of the notice of submission of the rule to the attorney general was mailed to all persons and associations who requested the notification. For the recommended format of the affidavit, see part 2010.9945.

2010.0500 RULE SUBMISSION AND AGENCY FAILURE TO SUBMIT REQUIRED DOCUMENTS.

Subpart 1. **Rule submission.** A rule is considered submitted to the attorney general when the rule and the record consisting of the required documents are received at the Office of the Attorney General, Public Finance Division located at ~~515 Transportation Building, John Ireland Boulevard~~ 525 Park Street, Suite 500, Saint Paul, Minnesota ~~55155~~ 55103.

Subp. 2. **Failure to submit required documents.** Failure to submit all the required documents makes a submission incomplete. The attorney general must promptly inform the agency of the missing documents. If the missing documents include the required ~~four~~ three copies of the rule as adopted, findings of fact, conclusions and order, declaration of the attorney in the attorney general's office who represents the

agency, or the statement of need and reasonableness for a rule adopted without a public hearing, the rule review period will not be initiated. For other missing documents, if the agency submits the missing documents to the attorney general within the attorney general review period, the submission shall be deemed complete and the period of review shall continue to run. If the missing documents are not submitted within the review period, the rule must either be withdrawn from review or rejected by the attorney general.

2010.0700 STATEMENT OF NEED AND REASONABLENESS.

The statement of need and reasonableness must contain a summary of the evidence and arguments that support both the need for and reasonableness of the proposed agency action of adopting a rule without a public hearing. In justifying the need for and reasonableness of the action, the agency must explain what circumstances have created the need for the rule or its amendment which required administrative action and why the proposed rulemaking action is an appropriate solution for meeting the need. The statement must explain the evidence relied upon and how that evidence rationally relates to the choice of action taken. A general statement of statutory implementation or restating the proposed rule will not suffice. The statement of need and reasonableness must also contain the following:

A. if required by Minnesota Statutes, section 14.115, a statement documenting the agency's consideration of methods for reducing the impact of the rule on small businesses and the results pursuant to Minnesota Statutes, section 14.115, subdivision 2. If the small business considerations in the rulemaking section are not applicable, the basis for the agency's exemption must be stated in the statement of need and reasonableness;

B. if the agency did not give a fiscal note pursuant to Minnesota Statutes, section 14.11, subdivision 1, because the reasonable estimate of the total cost to public bodies to

implement the rule is less than $100,000, a statement that Minnesota Statutes, section 14.11, is not applicable;

C. if required by Minnesota Statutes, section 16A.128, subdivision 1, the approval of the commissioner of finance if the rule sets or adjusts a fee charged; ~~and~~

D. the signature of the person authorized to adopt the rule or authorized to promulgate the rule pursuant to the certificate of authorizing resolution and the date the statement was signed; and

~~C.~~ E. any information required by any other law or rule to be included in the statement of need and reasonableness.

2010.1000 STANDARDS OF REVIEW.

A rule must be disapproved by the attorney general if:

A. The rule as submitted is not a statement of general applicability and future effect adopted to implement or make specific the law enforced or administered by ~~the~~ that agency or to govern ~~the agency's~~ its organization or procedures.

[For text of items B to I, see M.R.]

J. The rule is unconstitutional or~~, in the case of emergency rules,~~ is unreasonable.

2010.1100 WITHDRAWAL OF RULE FROM REVIEW BY ATTORNEY GENERAL.

The agency may withdraw a rule from review by the attorney general. To withdraw a rule after it has been submitted to the attorney general, a written order of withdrawal of the rule from review must be submitted to the attorney general. The written order must state the date of withdrawal and be signed by a person authorized to adopt the rule or sign the findings of fact, conclusions, and order adopting the rule. Upon receipt of the written withdrawal, the attorney general shall return the submitted documents to the agency.

2010.1200 DISAPPROVAL.

If a rule is disapproved, the attorney general must state in writing the reasons for disapproval and make recommendations to overcome the deficiencies. The statement of the reasons for

disapproval must be sent to the agency, the chief administrative law judge, the legislative commission to review administrative rules, the revisor of statutes, and persons who requested to receive a copy of the decision. Upon disapproval, the review period terminates and the rule must neither be filed in the office of the secretary of state nor published unless the rule is resubmitted and approved upon resubmission. Upon disapproval, the attorney general shall return the submitted documents to the agency.

2010.1300 RESUBMISSION.

Subpart 1. **Resubmission.** To resubmit a rule which was withdrawn or disapproved by the attorney general, the following documents must be submitted:

A. All documents that were previously submitted to the attorney general for review of the resubmitted rule that were returned to the agency by the attorney general upon withdrawal or disapproval.

B. A supplemental findings of fact, conclusions, and order adopting the rule. The order must be signed by a person authorized to adopt the rule or authorized to sign the findings of fact, conclusion, and order adopting the rule. If any modifications were made to the rule since the rule was withdrawn or disapproved, findings of facts and conclusions must be set forth supporting the reasons for the changes and explain why the changes do not constitute substantial changes.

~~B.~~ C. A supplemental certificate of the multimember agency's resolution if:

(1) the agency is a multimember agency as provided in Minnesota Statutes, section 15.0597, subdivision 1a;

(2) modifications were made to the rule since the rule was withdrawn or disapproved; and

(3) the certificate of the agency's resolution submitted in accordance with part 2010.0300, item J, or 2010.0400, item I does not authorize the modification by the person who signed the supplemental findings of fact,

conclusions, and order. The supplemental certificate of the agency's resolution must be in accordance with part 2010.0300, item J or 2010.0400, item I.

~~C.~~ D. If any modifications were made to the rule as adopted since the rule was withdrawn or disapproved, ~~four~~ three copies of the rule as adopted with the modifications reflected and approved as to form by the revisor of statutes.

~~D.~~ E. A new notice of submission of the rule to the attorney general mailed to any persons who requested notification pursuant to Minnesota Statutes, section 14.26 or 14.32. The notice of submission to the attorney general must comply with part 2010.0300, item N or 2010.0400, item M.

~~E.~~ F. The affidavit of mailing for the notice of submission of the rule to the attorney general, if applicable. The affidavit must comply with part 2010.0300, item O or 2010.0400, item N.

~~F.~~ G. Any other documents necessary to demonstrate that the procedural or substantive deficiencies have been remedied.

[For text of subp 2, see M.R.]

2010.1400 APPROVAL OF RULE.

Subpart 1. **Approval.** If the rule is approved, the attorney general shall promptly file two copies of the rule with the secretary of state. A copy of the approval memo and the approved rule must be sent to the agency~~.~~. A copy of the approval memo must be sent to the chief administrative law judge, the legislative commission to review administrative rules, and persons who requested to receive a copy of the decision.

Subp. 2. **Return of record.** Upon approval of a rule, the attorney general shall return to the agency ~~one approved copy of the rule, any extra copies of documents and any petitions, requests, submissions, or comments directed to the agency~~ the submitted documents. The agency is required pursuant to Minnesota Statutes, section 14.365, to maintain the official

rulemaking record for every rule adopted.

2010.9915 RECOMMENDED NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING.

Department of _____

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____	NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING

Notice is hereby given that the State _____ intends to adopt the above-entitled rule without a public hearing following the procedures set forth in the Administrative Procedure Act for adopting rules without a public hearing in Minnesota Statutes, sections 14.22 to 14.28. The statutory authority to adopt the rule is [specific statutory citation.]

All persons have 30 days, until _____, 19__, the end [insert the calendar date of end of comment period (see Minnesota Rules, part 2010.0300, item G, subitem (2), for method of calculation)] in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing ~~should state~~ must include his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed. If a public hearing is required, the agency will proceed pursuant to Minnesota Statutes, sections 14.131 to 14.20.

Comments or written requests for a public hearing must be submitted to:

[Name, address, and telephone number]

The proposed 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 rule as noticed.

~~{~~A copy of the proposed rule is attached to this notice.~~}~~

~~or~~

~~{The rule proposed for adoption relates to the following matters-{~~ [If the proposed rule is not attached to the notice, then the notice must include an informative statement describing the nature and effect of the proposed rule~~}~~. A free copy of the rule is available upon request from _____.]

A Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rule and identifies the data and information relied upon to support the proposed rule has been prepared and is available from _____ upon request.

[If applicable, other notices which are required or chosen to be inserted in the Notice of Intent to Adopt a Rule Without a Public Hearing must be inserted, for example, Minnesota Statutes, section 14.11, subdivision 1, 14.115, subdivision 4.]

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the Attorney General for review as to legality and form to the extent the 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 adopted rule, must submit the written request to _____.

_____ _____

Date [Name]

_____

[Title]

2010.9920 RECOMMENDED AFFIDAVIT OF MAILING THE NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING OR AN EMERGENCY RULE AND CERTIFICATE OF MAILING LIST.

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____	AFFIDAVIT OF MAILING THE NOTICE OF INTENT TO ADOPT [A RULE WITHOUT A PUBLIC HEARING] [AN EMERGENCY RULE] AND

CERTIFICATE OF
MAILING LIST

STATE OF MINNESOTA)
)ss.
COUNTY OF [_____])

_____, being sworn says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 or 14.30, that their names be placed on the state _____ rulemaking mailing list is accurate, complete, and current as of this ___ day of _____, 19___.

That on the _____ day of _____, 19_____, at least three days prior to the date the notice was published in the State Register, at the City of [_____], County of [_____], State of Minnesota, I mailed the ~~attached Notice of Intent to Adopt [A Rule Without a Public Hearing] [an Emergency Rule]~~ _____ (state what was mailed, for example: (1) Notice of Intent and (2) the proposed rule) by depositing in the [State of Minnesota Central Mail System for United States mailing] [United States mail], a copy thereof, with postage prepaid, to all persons and associations on the aforementioned mailing list.

[For rules adopted without a public hearing (not emergency rules)]:

That on the day of , 19 , I mailed the Statement of Need and Reasonableness to the Legislative Commission to Review Administrative Rules when the statement became available to the public.

_____
[Name]

Subscribed and sworn to before me this ____ day of _____, 19 __.

_____
[Title]

_____

2010.9930 RECOMMENDED FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING THE RULE WITHOUT PUBLIC HEARING.

STATE OF MINNESOTA

DEPARTMENT OF _____

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____

FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING

RULE WITHOUT PUBLIC HEARING

Notice of the [Commissioner's] [Board's] [Commission's] intent to adopt the above-entitled rule was published in the State Register on _____, 19 ___ and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 on _____, 19__. The statement of need and reasonableness was prepared and available to the public before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the rulemaking mailing list and published in the State Register. ~~and was available to the public.~~ A copy of the statement of need and reasonableness was sent to the Legislative Commission to Review Administrative Rules when it became available to the public. [For rules that establish or adjust fees ~~after July 1, 1987~~: Before the notice was submitted to the State Register, a copy of the notice of intent to adopt rules without a public hearing and the proposed rule was sent to the chairs of the house appropriations committee and senate finance committee.]

All persons were given the opportunity to submit comment on the rule for 30 days after notice of proposed rulemaking. ~~[~~The agency received _____ comments and submissions on the rule. The agency received _____ requests for notice of submission to the attorney general. The agency received _____ requests for a public hearing [, of which ____ were subsequently withdrawn]. Therefore, the agency did not receive ~~request~~ requests for a public hearing from 25 or more persons ~~which were not withdrawn.]~~ ~~or [No requests for a public hearing on the rule were received by the agency.]~~

~~[If applicable: No submissions or comments on the rule were received by the agency. No requests for notice of submission to the attorney general were received by the agency.]~~

Based on the comments and evidence in the record before the agency, I find the following:

[If any changes were made between the rule as proposed and the rule as adopted, findings of fact and conclusions supporting the reasons for the changes and explanations why the changes do

not constitute substantial changes as provided in the attorney general rules, part 2010.1000, item D must be set forth.]

The above-captioned rule is needed and reasonable.

NOW, THEREFORE, IT IS ORDERED that the rule identified as _____ [as modified] is adopted this ____ day of _____, 19___, pursuant to authority vested in [me] [the Board] [the Commission] by Minnesota Statutes, section _____.

[Name] _____

[Title] _____

2010.9940 RECOMMENDED NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO ATTORNEY GENERAL.

STATE OF MINNESOTA

DEPARTMENT OF _____

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____	NOTICE OF SUBMISSION OF RULE ADOPTED WITHOUT PUBLIC HEARING TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 14.26:

PLEASE TAKE NOTICE that the above-captioned rule as adopted has been submitted to the Office of the Attorney General on the date of this notice, _____, 19___, for review as to legality and form to the extent form relates to legality. The proposed rule, the rule as adopted, all the notices, the Statement of Need and Reasonableness, all written comments and requests for a hearing received, and other required documents also have been submitted to the Attorney General.

[(If the proposed rule has been modified:) The proposed rule which was published in the State Register and made available to the public on _____, 19___, has been modified. A free copy of the rule as modified as well as the findings of fact, conclusions, and order explaining the amendments and adopting the rule is available upon request from _____. (or) A copy of the rule as modified is enclosed with this notice.]

The rule must be approved or disapproved by the Attorney General within 14 calendar days of the date of submission to the attorney general. You may submit written comments to the attorney general on the legality of the rule. Any written comments must be submitted ~~within~~ by 5:00 p.m. _____, 19__, eight calendar days of the date of submission of the rule to the Attorney General. Your comments must address only the issue of legality of the rule or the legality of the specific parts or subparts of the rule. The attorney general standards for review are set forth in Minnesota Rules, part 2010.1000. You may receive a copy of the attorney general decision upon written request to the attorney general. Your comments or requests for the decision must be directed to:

The Office of the Attorney General
Public Finance Division
~~515 Transportation Building~~
~~John Ireland Boulevard~~
525 Park Street, Suite 500
Saint Paul, Minnesota ~~55155~~ 55103
Telephone Number: (612) 297-2040

Any written comments submitted to the Attorney General must be submitted simultaneously to:

[Name, address, and phone number of appropriate person in the agency]

[Name] _____

[Title] _____

Dated: _____

2010.9950 RECOMMENDED NOTICE OF INTENT TO ADOPT AN EMERGENCY RULE.

Department of _____

In the Matter of the Proposed Adoption of Emergency Rule of the State Governing _____

NOTICE OF INTENT TO ADOPT AN EMERGENCY RULE

Notice is hereby given that the State _____ intends to adopt the above-entitled emergency rule. The statutory authority to adopt the emergency rule is contained in Minnesota Statutes, section _____. 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 ~~for longer specified time~~ [insert the calendar date of last day of end of comment period (see Minnesota Rules, part 2010,0400, item E, subitem (2), for method of calculating the comment period)] 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:

[Name, address, and telephone number]

~~A copy of the proposed rule is attached to this notice.~~

~~or~~

~~The rule proposed for adoption relates to the following matters~~ If the proposed rule is not attached to the notice, the notice must include an informative statement describing the nature and effect of the proposed rule~~.~~

A free copy of the proposed emergency rule is available by contacting _____.

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 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 adopted rule, must submit the written request to _____.

The emergency rule will take effect five working days after approval by the Attorney General and be effective for ____ days. The emergency rule will be continued in effect for an additional ____ days if the agency gives notice of continuation in accordance with Minnesota Statutes, section 14.35.

[If applicable, other notices which are required to be inserted in the Notice of Intent to Adopt Emergency Rules must

be inserted.]

_____ _____
Date [Name]

_____
[Title]

2010.9955 RECOMMENDED FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING EMERGENCY RULE.

STATE OF MINNESOTA

DEPARTMENT OF _____

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____ FINDINGS OF FACT, CONCLUSIONS, AND ORDER ADOPTING EMERGENCY RULE

Notice of the [Commissioner's] [Board's] [Commission's] intent to adopt the above-entitled emergency rule was published in the State Register on _____, 19___ and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, section 14.30 on _____, 19___.

All persons were given the opportunity to submit written comment on the rule for at least 25 days after notice of proposed rulemaking.

~~[If applicable: No~~ The agency received _____ comments and submissions ~~or comments~~ on the rule ~~were~~. The agency received ~~by the agency: No~~ _____ requests for notice of submission to the attorney general ~~were received by the agency]~~.

[If any changes were made between the rule as proposed and the rule as adopted, findings of fact and conclusions supporting the reasons for the changes, and explanations why the changes do not constitute substantial changes as provided in the attorney general rules part 2010.1000, item D must be set forth.]

NOW, THEREFORE, IT IS ORDERED that the rule identified as _____ [as modified] is adopted this _____ day of _____, 19___, pursuant to authority vested in [me] [the Board] [the Commission] by Minnesota Statutes, section _____.

[Name] _____

[Title] _____

2010.9960 RECOMMENDED NOTICE OF SUBMISSION OF THE EMERGENCY RULE

TO ATTORNEY GENERAL.

STATE OF MINNESOTA

DEPARTMENT OF _____

In the Matter of the Proposed Adoption of the Rule of the State _____ Governing _____

NOTICE OF SUBMISSION OF EMERGENCY RULE TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 14.32:

PLEASE TAKE NOTICE that the above-captioned emergency rule as adopted has been submitted to the Office of the Attorney General on the date of this notice, _____, 19___, for review as to legality and form to the extent form relates to legality. The proposed emergency rule, the rule as adopted, all the notices, all written comments received and other required documents also have been submitted to the attorney general.

[(If the proposed emergency rule has been modified:) The proposed emergency rule which was published in the State Register and made available to the public on _____, 19___, has been modified. A free copy of the emergency rule as modified as well as the findings of fact, conclusions, and order explaining the amendments and adopting the rule is available upon request from _____. (or) A copy of the rule as modified is enclosed with this notice.]

The rule must be approved or disapproved by the Attorney General on the tenth working day following date of receipt of the rule. You may submit written comments to the Attorney General. Any written comments must be submitted ~~within~~ by 5:00 p.m. _____, 19 __, seven working days of the date of this notice. Your comments must address only the issue of legality of the rule or the legality of the specific parts or subparts of the rule. The attorney general standards for review are set forth in Minnesota Rules, part 2010.1000. You may receive a copy of the attorney general decision upon written request to the attorney general. Your comments or requests for the decision must be directed to:

The Office of the Attorney General
Public Finance Division

~~515 Transportation Building~~
~~John Ireland Boulevard~~
525 Park Street, Suite 500
Saint Paul, Minnesota ~~55155~~ 55103
Telephone: (612) 297-2040

Any written comments submitted to the Attorney General must be submitted simultaneously to:

[Name, address, and phone number of appropriate person in the agency]

_____
[Name]

_____
[Title]

Dated: _____

In the Matter of the Proposed Revision to Minnesota Rules, Chapter 1230.0100 to 1230.1910 Relating to State Contracts and Relating to the Small Business Procurement Program

Statement of Need and Reasonableness

I. Introduction

The Department of Administration (hereinafter Department) proposes to revise the rules governing state contracts and the rules governing the program for small businesses owned by disadvantaged persons. These rules are now contained in MR 1230.0100 through 1230.2300. The need for the proposed revised rule, to be adopted as a "permanent rule relating to business", MR 1230.0100 through 1230.1300, and a "permanent rule governing the Small Business Procurement Program", MR 1230.1400 through 1230.1910 arises from the legislative amendments to the Small Business Procurement Program laws of 1990, Chapter 541. In addition there is a need to update the existing rules to reflect organizational changes, improved technology, or options to provide in the administration of these programs. Grammatical changes and reorganization of the rule format have also been undertaken to provide clarification, ease of reading, and consolidation of like subject matter.

Chapter 1230 has been operative with subsequent amendments for more than 25 years under prior MCAR designations and as MR 1230. The rules governing state contracts under 1230.0100 through .1300 cover the competitive bidding process with provisions for soliciting, advertising, bid securities and the opening of bids. The award of contracts, contract performance, penalties for failure to perform, suspension or debarment, appeals of such actions,

probation and reinstatement are described, all of these provisions are key facets of the various model code recommendations developed for public procurement activities. The rules governing the Small Business Procurement Program 1230.1400 through .1910, except for a few definitions, are all new as a result of significant statutory changes. The statutory changes and these rules reflect the need to meet a variety of "tests" outlined by the United States Supreme Court in J. A. Croson Company, Inc. v. City of Richmond, 57 U.S.L.W. 4132 (1989). The court described the restrictions under which state and municipal governments can enact preference programs to counter discrimination encountered by businesses in dealing with public entities. The statute was enacted with tests such as "strict scrutiny", "specific remedy" and "narrowly tailored" as requirements. The rules reflect the administrative procedures, actions and documentation needed to carry out the program while meeting the court restraints and legislative provisions established.

The impact of the revisions falls primarily on the Department in its administrative activities. The criteria used in determining eligibility for targeted group or economically disadvantaged area businesses, the application of programs and requirements effecting these groups, the investigations, or circumstances, leading to consideration of suspension or debarment and the management of the appeal processes for all categories of vendors increase the burden on the Department in the administration of the program. These procedures are necessary, and needed to ensure the integrity of the program, to maintain the documents and data needed under the concept of "strict scrutiny" and to carry out the legislative intent that the benefits of these programs are delivered solely to those for whom the program was "narrowly tailored".

The additional definitions, more precisely described criteria and the description of appeal provisions should impact on small businesses in a positive manner and on all responsible vendors beneficially by discouraging and eliminating illegal and unfair competition from state bidders lists. The development of size standards defining small businesses that vary by industry and market should open up the benefits of the small business procurement program to small vendors previously excluded.

The statutory authority to adopt these amendments to the rules is contained in Minnesota Statutes §16B.04, 16B.18, 16B.19 and 16B.22.

II. Proposed changes

General: Throughout the rule, nonsubstantive changes were made, including improving form or language reducing "legalese" and using "layperson" language, correcting job titles and division references and deleting gender references.

Part .0150 Definitions: Twenty-five definitions are needed to understand and clarify terminology or procedures involved in administering state contracts and the Small Business Procurement Program. These definitions have been consolidated under this part for more effective organization and ease of reference.

Subpart 2, "affiliate or subsidiary of a business dominant in its field of operation" - affiliates or subsidiaries of dominant businesses or businesses owned by persons actively involved in dominant businesses, have

access to an established support and mentoring system, and are not normally in need of the assistance provided by the Small Business Procurement Program. A 20% (or more) interest in a business normally has an impact on how that business is operated. This definition, when used in conjunction with program eligibility criteria, will ensure that only those small businesses without significant ties to dominant businesses will receive the benefits of the program.

Subpart 3, "broker" - has been expanded to include ongoing agreements with a manufacturer's authorized distributors as a means of establishing that a business does not operate as a broker.

Subpart 4, "business" - limits the definition of business for the purpose of this program to "for profit" enterprises. Non-profit endeavors have other support and benefit programs available to them.

Subpart 5, "contractor" - no change.

Subpart 6, "dealer, jobber or distributor" - no change.

Subpart 7, "debarment" - defines the term in relation to the program and eligibility to bid on state contracts. The rule as proposed includes a debarment procedure which is needed to eliminate unfair, unscrupulous, ineffective or criminal vendors from participating in public procurement programs.

Subparts 8, and 9, "director" and "division", existed in the previous rule and have been revised to reflect changes in organizational titles and responsibilities in the Department of Administration.

Subpart 10, "franchises" - franchise operations normally do not meet the criteria for "ownership and control" of a business required of individuals seeking certification under the Small Business Procurement Program. As specified in 1230.1700 subpart 5 (a) "criteria for

determinations", cites the terms meeting test of ownership needs under which franchise agreements will be evaluated for eligibility.

Subpart 11, "joint venture" - rewritten to reflect new terminology such as "targeted group" or "economically disadvantaged area businesses" provided in the statute which authorized the Small Business Procurement Program (see definition of targeted group businesses) as it applied to that program. Balance of definition unchanged under meanings used for state contracts in general.

Subpart 12, "liquidated damages" - no change.

Subpart 13, "manufacturer" - no change.

Subpart 14, "manufacturer's representative" - expanded to include agreements with manufacturer's authorized distributors, this recognizes that some large manufacturers are organized to deal only through authorized distributors.

Subpart 15, "material variance" - no change.

Subpart 16, "open market" - purchases made at amounts below specified statutory limits may be made by bid or on the open market. This definition is needed to clarify what is meant by the term "open market".

Subpart 17, "person" - needed to clarify the meaning when "business" or "person" terminology is used interchangeably.

Subpart 18, "principal place of business" - needed to clarify meaning when benefits or preferences are dependent on location.

Subpart 19, "reinstatement" - is needed to define the precise meaning when a debarment action is involved. Eligibility one year from the end of the debarment period is needed to provide sufficient time for the applicant to meet all the reinstatement criteria specified in Part .1175.

Subpart 20, "responsible bidder", was expanded to include an ability to obtain bonding and to be free from criminal activities, or debarment by other government entities, and unresolved tax problems, as additional requisites defining responsible bidder. These requisites are needed to prevent the loss of time, effort and money by the state in dealing with "irresponsible" vendors. Inability to obtain sufficient bonding would expose the state to losses in the event of failure to perform if the project were awarded without such security. Additional costs and time are involved in rebidding projects or awarding to the next lowest bidder. Criminal activities, debarments and unresolved tax issues are all indicators of potential contract problems so such vendors should not be competing for state awards while those conditions exist. Provisions to expedite the exchange of information needed to qualify under this definition is also included so that the state and the bidder may establish status in a time period reasonable to both parties.

Subpart 21 - "SIC or Standard Industrial Classification" - the use of Standard Industrial Codes is needed as a statistical organizing and reference format for Department program reports, business size standards, and certified directory listings. The Department was directed by statute to consolidate reports from state agencies, the University of Minnesota and several Metropolitan Council Agencies, to develop size standards to describe small businesses that are variable by industry, and to publish a directory of certified businesses for use by the State and public entities cited above. The organizing format most easily maintained, referenced and updated, by the Department, given the variety of purposes, availability of data, and reporting needs involved is the SIC since the federal government keeps the code system and definitions updated on a regular basis.

Subpart 22 - "suspension" - both parties need to be protected when suspicious illegal or unacceptable activity is present. Suspension gives the State time to investigate, prevents further occurance of the prohibited activity and places time limits on the process so that the vendor may know when activity can resume if the problem is resolved or the suspicion removed.

Subpart 23 - "targeted group businesses" - reflects new terminology created by statutory change. Identifies groups which are eligible for certain benefits under the Small Business Procurement Program, when so designated by the Commissioner as authorized in the Statute.

Subpart 24 - "terms governing socially disadvantaged persons" - no change.

Subpart 25 - "third party lessor" - no change.

Subpart 26, "small business eligible for certification as socially disadvantaged business or economically disadvantaged area business" - rewritten to provide a needed definition as Minnesota Statute 645.445 subdivisions 2 and 5 defining small business no longer apply to the Small Business Procurement Program enacted by the 1990 legislature. The "narrowly tailored" requirement of the court in Croson v. City of Richmond is met in restricting the program to for profit operations, located in Minnesota and owned by eligible persons as defined in subpart 24; all such needs or requirements are specified in the Statute enacting the Small Business Procurement Program.

Subparts 3, 5, 6, 11, 13, 14, 24, 25 and 26 have been relocated from definitions under the existing emergency rule 1230.1550. Subparts 3, 5, 6, 11, 13, 14, 24 and 25 also exist in the permanent rule now in effect and are incorporated here with no substantive changes other than those language or format changes shown under "general", II. proposed changes.

Part .0300 "soliciting bids" - purchase limitations will change over time in dollar amounts which reflect economic conditions of inflation or deflation resulting in the need to repeatedly update the rule. The statutory reference is not likely to change, therefore the rule, as revised, will normally reflect the existing limitations without constant revision. Use of the term "will be advertised" allows the Division, over time, to take advantage of developing technology such as electronic media in addition to the printed page to solicit bids. In subpart 2 the addition of the term "services" in conjunction with "commodities" reflects changes in the economy and in the administration of programs as more service type activities are contracted for state operations. Subpart 3 has been amended to provide for initial screening before being placed on bid lists. The numbers of vendors seeking access to state bid lists have grown over time. Managing these lists has become an administrative problem and a cost factor. Preparation and distribution of bid solicitations are a rising cost factor. Initial screening through an application process will help to ensure only responsive, responsible bidders are kept on state bid lists. Removing non-responsive bidders from the bid list without notice is needed to keep such lists effective and confined to bidders who actively respond to invitations to bid. In most cases non-responsive bidders have moved, gone out of business or no longer care to do business with the State. Notification is an unnecessary and additional cost factor to the State.

Part .0400 "Submission of advertised bids". Wording was rearranged for clarification and ease of reading, and is needed to emphasize that all bid conditions are not standard and that bidders should respond to

specified special conditions. The invitation to bid will be the defining document. It is reasonable to require that specific bid conditions which are applicable to a purchase supersede general bid terms.

Part .0500 "bid security". Grammatical, word choice changes only. No change of meaning or substance.

Part .0600 "bidder errors". Reworded to be gender neutral and to include technology improvements such as "facsimile" when appropriate.

Part .0700 "opening of bids". No significant change except that reference to 16B.07 on records retention and public availability is redundant in that Division records are public records for access purposes.

Part .0900 "tied bids". No significant change.

Part .1000 "contract performance". Grammatical and word changes only to reflect organizational titles, clarify, or for ease of reading.

Subpart 8, is revised to clarify that "discount" times offered by vendors do not commence, if testing is required, until test results are in hand.

Part .1100 "failure to perform". No significant changes. References and word changes made for clarity or for ease of reading. "Not promptly replaced" was deleted as being vague in terms and permitting the delivery of unacceptable goods or materials if replacement is then made.

Part .1150 "authority to debar or suspend". The authority and need for provisions to suspend or debar vendors arises from the Department responsibility to protect the public interest and public funds in state purchasing. The authority to administer the state purchasing programs encompasses the authority to preclude irresponsible bidders from bidding on state contracts and to debar when justified. Large scale procurement

programs such as that operated by the State provide vendors with opportunities for a variety of means to defraud, misrepresent, or provide inferior commodities and services. Circumstances also arise in which an otherwise legal vendor cannot, or will not, abide by the terms of a contract in-so-far as delivery times, quantities of goods or place and condition of delivery. Such circumstances going unresolved necessitates removal from State bid lists. The Department has a need to maintain a list of responsive and responsible bidders, therefore a means to remove vendors not meeting such criteria is required. Debarment provides the process needed to purge the lists of irresponsible or fraudulent vendors. This part describes the process which provides protection to the State and provides due process rights to the vendor through a suspension procedure while an investigation is conducted. It provides for written notice to the vendor, details acts and circumstances which can cause debarment, provides for reciprocity honoring debarment by other governmental activities, provides for an appeal and review process, defines and places limitations on the length of debarment, and requires that a public list of debarment actions be maintained for record purposes and as a reference for future "responsible bidders" determinations. The lengths of time specified in the appeal process are minimized so that the vendor may be protected from overly long administrative processes while providing time for the Department to conduct an effective review. Debarment periods of one to three years are considered reasonable. These terms provide protection to the State from continuous involvement in a running series of disputes with a contentious vendor while providing sufficient time for a debarred vendor to correct deficiencies and establish a new "track record" prior to applying for reinstatement. Each

of the debarment causes criterion in subpart 2 are necessary and reasonable grounds for debarment. Sections A, B, and C are all convictions, should a bidder be convicted of an offense related to public procurement it is reasonable to prohibit the bidder from participating in the state bid process. Part D is reasonable in that the performance of an awarded contract under all the specifications, time limits and other contract criteria is inherent to the concept of competitive bidding and contract awards. Part E is needed and reasonable in that the actions cited all violate and contaminate the integrity of the bid process.

Part .1175 "reinstatement and probation" - provides a means and process for a debarred vendor to be reinstated to State bid lists. Lists the information needed to apply for reinstatement and provides for a probationary period following reinstatement. Protects the applicant vendor from arbitrary administrative processes by describing the reinstatement process and information required. In providing for probation it protects the State from again needing to debar a vendor and in the case of continued failure authorizes permanent removal from State bid lists. The one year time period specified in the rule is considered reasonable. This allows the vendor time to correct deficiencies or establish a new "track record" while freeing the State from continuous investigation or litigation with a contentious applicant. The requirements for reinstatement in subpart 3 are reasonable and needed to provide sufficient information, data or performance statistics so that the method of evaluating whether or not a vendor should be reinstated is consistant, fair and based on an informed process.

Part .1200 - "contract cancellation" - recognizes that timeliness in delivery, as well as condition of delivery, are important

considerations in contract performance. Late or untimely deliveries add costs to State activities and prevent the best application of public funds, it is therefore reasonable to include this condition as a basis for cancellation of the contract.

III. Proposed Rule - MR 1230.1400 through .1910 - Small Business Procurement Program

Extensive revision of these parts of the rule are necessitated by statutory changes that enacted a new program, based on the clientele of the old program (which was invalidated by Court stipulation) in Sorenson Bros. Inc. v. Commissioner of Transportation and Commissioner of Administration 1989, while incorporating some features and experience involved in administering the one year interim program which filled the gap between the two authorizations. These rules are more complex, extensive, and detailed than the previous rules because the authorizing legislation needed to respond to a wide variety of concerns, particularly those involving accountability, documentation and scrutiny outlined by the Courts in J. A. Croson v. City of Richmond and other similar cases.

Every effort has been made to minimize the impact on small businesses. When documentation or financial data is required the rule asks for, or accepts, only that which is normally provided to taxing, licensing or financial institutions in the public and private sectors. These data and disclosures are normal in the conduct of business by most private concerns.

The primary impact is absorbed or placed on the Department in administering or managing all the various provisions of the program. When data sources are used such data, as required, is commonly available in public reference libraries or through federal government publications. Even though the rule describes complex processes the net impact on the small business is no more burdensome than under the prior program which applied for more than 15 years.

Key words used throughout this rule are "targeted group" and "economically disadvantaged area" small businesses. Each has a very specific meaning, eligibility for various benefits or preference are based on those meanings.

"Targeted group" - means small businesses owned and operated by specified minorities or persons of color, women, or the physically disabled, which are identified by and so designated by the Commissioner of Administration based on data and statistics showing that the group or subgroups in question have failed to receive an equal share of public contract awards in proportion to their representation and availability in the market providing commodities and services needed by the State and other public entities. The "targeting" of businesses can be by groups or subgroups of people providing specific commodities or services. Such groups are identified with reference to the four-digit SIC (Standard Industrial Code) numbers published by the Federal Government.

"Economically disadvantaged area small business" means businesses owned by persons regardless of race, color, gender or physical ability who live in, or conduct business from, a designated economically disadvantaged area. At the county level the U.S. Department of Labor designates labor surplus areas based on unemployment statistics. These labor surplus areas are eligible as economically disadvantaged areas. Also eligible as economically disadvantaged areas are counties where the median income for married couples is less than 70% of the statewide median income for married couples as determined by the State Department of Revenue. Sub-county areas based on targeted neighborhoods as described in Minnesota Statutes Section 469.202 or enterprise zones described in Section 469.167 may also be designated as economically disadvantaged areas by the Commissioner of Administration. Rehabilitation facilities or work activity programs are eligible for the same preferences as economically disadvantaged areas.

These definitions result in 10 categories of businesses eligible for certification under the program: businesses owned by Women, Alaskan Natives, American Indians, Asians, Blacks, Hispanics, the disabled, and businesses located in or owned by persons living in a labor surplus area, a median income county, or other such area so designated and rehabilitation facilities or work activity programs.

Part .1400 "purpose" - corrects statute and rule citations and specifies that preference programs are limited to targeted group and economically disadvantaged area small businesses as required by the legislation.

Part .1450 "scope" - Since all businesses operating under this program must also abide by rules governing state contracts, this part outlines the order of effect when conflicts occur. It is reasonable to have the more specific applicable rules take precedence over the general rules.

Part .1600 "Eligibility for Socially Disadvantaged or Economically Disadvantaged Area Small Business Program" - The "socially disadvantaged" program includes all targeted group businesses, and may also include businesses owned by socially disadvantaged persons providing commodities and services in non-targeted SIC classifications who are encountering a "lack of adequate external support". These businesses are eligible for certification under special criteria as an individual business, and not as a group, when they encounter discriminatory practices in the private sector which leads to inadequate economic support to maintain a viable, competitive business.

Under subpart 2 franchises are not eligible because in most cases franchise agreements do not meet the criteria for ownership or control. Where these criteria are met the business can be eligible for certification, but this is not normally the case.

The statute also requires that the program be limited to small businesses, and that the Department create criteria defining small business. This requirement recognizes that "small" in one commodity or service field may not necessarily be "small" in another field. The rule selects gross revenues or sales as the easiest factor to monitor, and describe a system, for defining the small business segment of the market in relation to that factor. The limitation that no size standard will

be set at less than $1,000,000, is needed to ensure that no previously certified business which is otherwise eligible would be excluded when such business was certified under the provisions of Minnesota Statutes section 645.445 which is no longer applicable to this program. Aggregate data from various financial reporting services is used to feed the calculation. Such data is available through subscription or is available in public reference libraries. Robert Morris Associates (R.M.A.) data will be the primary source as the breakdown of various financial data reported in their "annual statement studies" most closely matches the size categories involved in small businesses eligible for this program. The R.M.A. data also covers more than 90% of the SIC categories needed to classify the commodities and services offered by vendors doing business with the State. Data provided by Dun and Bradstreet or other appropriate reporting services will be used for the balance when needed. Using the average of 3 to 5 years of financial data from the reporting services is needed to determine trends free of one year anomilies caused by variables and unknowns in the economy.

Under subpart B.(4) the need to aggregate size standards under two and three digit SIC codes whenever feasible is directed at simplifying the standard lists to reduce the number of 4-digit standards from a potential of 1,002 to less than 400. Setting variance percentages requiring a 3-digit or 4-digit standard is needed to prevent excluding an otherwise eligible business because averaging reduced the standard.

The Department is responsible for establishing the size standard under the process outlined in the rules. Small businesses are not involved in

the definition process but do provide data on their own gross revenues or sales when applying for certification. The rule also provides for a recurring sequenced revision of the size standards so as to reflect current economic conditions. Use of the lower quartile data to establish small business size standards was selected as it coincides with the statutory requirement that 25% of all state procurements be acquired from small businesses. For example; under the concept of proportional purchasing used elsewhere in this rule, as a requirement specified by statute, the objective is to award contracts in accordance with representation in the marketplace. Since the statute also requires that 25% of all state procurements be obtained from small businesses it is reasonable to apply that percentage as a factor in determining small business size standards. The process examines individual segments of the marketplace as defined by SIC number and determines how many businesses share 25% of the reported market, based on total contract revenues or sales working upward from the lowest individual income reported and aggragating towards the 25% share. The small business standard is determined from the data so identified. It is reasonable then that the 25% share directed by statute for small businesses be obtained from the lower quartile in any given market segment.

Part .1700 "Certification of Eligibility" - The documentation specified in this part is needed to establish that the applicant meets the definition outlined in 1230.0150, subpart 26 "small businesses eligible for certification as a socially disadvantaged business or economically disadvantaged area business" and .0150, subpart 24 "terms governing socially disadvantaged persons" and subpart 23 "targeted group

businesses" or an individual business meeting socially disadvantaged criteria but not operating as a targeted business enterprise and "lacking adequate external support".

The need for financial statements is based on the requirement to limit the program to eligible small businesses. Providing the last complete three year statements, when feasible, permits the Department to compare the applicants sales or revenues averaged over a three year period with the appropriate size standard which is based on a three year average. Averaging both the standard and the applicants data minimizes the impact of one year anomolies in either the economy or the applicants enterprise. Longer term trends provide a more reliable basis to ensure that no applicant is unfairly excluded, and three years is a sufficiently adequate length of time to make this determination.

Definitions of the owners management responsibilities with appropriate resumes and descriptions of the duties of other key personnel, as required under subpart 1 D. (2), is critical in determining if the applicant actually manages the business or is a figurehead fronting for other interests.

Ownership is also a key element of certification, therefore documents establishing ownership, the percentage thereof, and the timing of acquisition as well as the method of acquisition are needed to prevent fraudulent applications and ensure that figurehead or "front" type organizations are not certified.

When the applicant seeks certification under the provision of "lacking adequate external support", provided for under subpart 1 B. (2), the financial data and organization of that data, outlined in subpart 1, E, F, and G, is based on a format in common use among the variety of loan and credit reporting associations such as Robert Morris Associates and Dun and Bradstreet. If the applicant was applying for credit with a supplier or financing from a lending institution the same data would be requested by those organizations, therefore it is reasonable for the Department to also request this information. In applying under the "lack of external support" provision the applicant is certifying that support from financial institutions in the private sector for financing, credit, bonding or insurance is not available. The intent of the Department is to review the applicant's financial statement in the same manner as did the private sector and arrive at conclusions such as; the applicant's company is not sound, and that the private sector action was justified, (in such case the applicant would be denied certification and would be referred for remedial assistance elsewhere in the public and/or private sectors), or that the applicants financial profile was adequate and that at some place in the private sector support should have been attainable but was not forthcoming, with the underlying assumption being the applicant is encountering private sector discrimination. Certification would then be granted assuming all other eligibility criteria were met. Investigation might also conclude that the applicant has a highly viable company and has access to adequate external support therefore the benefits of certification would be denied as superfluous or redundant.

While description of the financial data and documentation under the provision for "lacking adequate external support" seems highly detailed and complex it does not exceed that required by the private sector nor any of the various public taxing authorities with which the applicant must deal. The applicant is required to submit the data in the format provided from information which the applicant should have on hand in the normal course of yearly control of the enterprise, therefore all the requested information is needed and reasonable.

Subpart 2 and 3, "grounds for claiming disadvantaged status" and "income statement" respectively are repealed as being superceded by the requirements of subpart and statutory changes. This is needed and reasonable to preclude redundancy and to eliminate confusion in terms and requirements.

In subpart 5, grounds for denying certification are described in detail so as to provide a rational basis for such action and for an appeal process when needed. The purpose of certification is to certify that the applicant meets all eligibility criteria and is exactly who the applicant represents to be, therefore falsified information on an application is grounds for rejection.

Subpart 5 F. states that franchise operations are not eligible because such agreements do not meet with the criteria for ownership and control therefore a franchise usually must be denied certification.

Under subpart 5 H. the Department is required to place time limits on participation in the program stemming from Court decisions and court "scrutiny" requirements and the legislative statute, therefore when a previously certified business or owner is decertified based on the time limitations specified elsewhere in the rule any application based on shared ownership with the decertified owner or business must be denied.

Subpart 5 I. states that denial of applications under the "lacks adequate external support" provisions must be made when the profile is under, or exceeds, the parameters specified. If "under" the profile parameter the company is probably not viable and would not meet the criteria set for being a "responsible vendor" under general contract rules; other remedial action must be taken before the applicant can again seek certification. If the applicant "exceeds" the profile parameters the applicant is operating a highly viable company which has succeeded despite the presumed discrimination and is not in need of the benefit or support that certification in the program provides.

In subpart 5 a. A thru H a major requirement for certification is that the applicant owns and operates on a day-to-day basis the company for which certification is sought. This is necessary to prevent fraud through front organizations, by absentee ownership, or by concealing control by dominant businesses or partners not meeting the definition of socially or economically disadvantaged persons. The criteria specified in the rule justifies the documentation required, the uses to which such documentation is put, and the conclusions which can or must be drawn

from this process. These criteria also form the basis on which decisions to deny or decertify may be appealed, thereby providing the applicant with protection from arbitrary or unilateral unsupported administrative decisions.

Exceeding the size standard for a given field of business automatically disqualifies the applicant from certification. To prevent owners from splitting off operations and forming more than one company, when the size standard is exceeded thereby showing two or more companies "under" the standard, it is necessary to confirm sales or contract revenues for same ownership companies in related fields.

In subpart 5 A I. the standards shown for certification under the "lacks adequate external support" provisions are the same as those used by financial institutions in the private sector. Exclusion of companies operating in the lower or upper quartile of the financial profiles is self-explanatory as written in the rule. The ratios used in determining eligibility for certification based on "lack of support" in long-term or working capital financing or in attaining equipment, raw materials or supplier trade credit are the same as used in the private sector and have proven reliable over the years when based on economy or industry wide experience.

Under subpart 5 a I(3) the financial ratios which will be used and are to be developed from the data submitted by the applicant are needed to assess the company's viability and are reasonable in that such measures are used throughout the financial community in the private sector.

For long term or working capital financing; earnings before interest and taxes (ebit)/interest is a measure of a firm's ability to meet interest payments; a high ratio may indicate that a borrower would have little difficulty in meeting interest obligations of a loan. This ratio also serves as an indication of a firm's capacity to take on additional debt. Sales/working capital; working capital is a measure of the margin of protection for current creditors. Relating the level of sales arising from operations to the underlying working capital measures how efficiently working capital is employed. Quick ratio - is a conservative measure of liquidity, (liquidity is a measure of the quality and adequacy of current assets to meet current obligations as they come due.) The ratio expresses the degree to which a company's current liabilities are covered by the most liquid current assets. Fixed/worth ratio is the extent to which an applicant's equity (capital) has been invested in plant and equipment (fixed assets); a lower ratio indicating a proportionately smaller investment in fixed assets to net worth and a better "cushion" for creditors in case of liquidation. The debt/worth ratio expresses the relationship between capital contributed by creditors and that contributed by owners. It expresses the degree of protection provided by the owners for the creditors. In total these ratios measure an applicants "liquidity" (defined above), "coverage", which measures a firm's ability to service debt and "leverage" position which is important in that highly leveraged firms are more vulnerable to business downturns than those with lower debt to worth positions. This is also an

important consideration in establishing the criteria limiting business participation in, and reliance on, the program which is discussed later in this statement.

For a determination involving lack of adequate external support involving obtaining equipment, raw materials, or supplier trade credit the current ratios and quick ratio are used. The quick ratio is described above. The current ratio is a rough indication of a firm's ability to service current obligations. Generally the higher the current ratio, the greater the "cushion" between current obligations and a firm's ability to pay them. Both the "current" and "quick" are measures of "liquidity", an important factor in extending short term credit.

Under subpart 5a I. (3) (d) any effectively marketed company operating in a viable commodity or service niche should be able to capture a proportionate share of its market in the absence of other factors such as management inefficiency or discriminatory practices. The method of determining proportionate share is based on a ratio of assets employed to contract revenues or sales gained as compared to the average company in the same field. After ruling out mismanagement, and all other factors being within acceptable parameters, failure to capture a proportionate market share can reasonably be attributed to discrimination factors in both the private and public sectors. Setting the qualifying limit at 75% or less recognizes that not all companies in a given field will achieve parity of 100% for assets employed, nor should they be expected to, however consistantly "underachieving" in a

market when all other factors are accounted for is good evidence of exclusionary or discriminatory factors at work.

Subpart 5a I (4) is reasonable and needed to satisfy the Department that the response of the private sector in treating the applicants requests were not arbritary and prejudiced. No reasonable private institution will under normal circumstances advance credit to a company suffering from inadequate management, nor should the Department accept as a "responsible bidder" such a company, therefore an assessment of management efficiency is need and considered reasonable. A series of ratios based on fiancial data can provide such an assessment; the following are considered as "operating" ratios and are intended to assist in the evaluation of management performance.

Percent profit before taxes/tangible net worth expresses the rate of return on tangible capital employed and can be used as an indicator of management performance when used in conjunction with other ratios since a high return normally associated with effective management could indicate an under capitalized firm and a low return usually an indicator of inefficient management performance could on the other-hand reflect a highly capitalized conservatively operated business.

Percent profit before taxes/total assets expresses the pre-tax return on total assets and measures the effectiveness of managment in employing the resources available to it.

Percent depreciation, depletion, amortization/sales and percent officers' compensation/sales are indicators of management stewardship in maintaining a viable company or depleting it for other interests.

Recognizing both the "prior remedy" requirement of the courts and the departments' need to protect public interests and public funds - in procurement by only dealing with "responsible" vendors, applicants whose financial and other supporting documentation indicate a company suffering from inefficient, ineffective or, at worst, outright mismanagement needs other help. The Minnesota Department of Trade and Economic Development is organized to assist in these matters therefore it is reasonable to refer such an applicant for assistance before again considering certification.

Having ruled out all other factors including management problems it is reasonable to conclude that the applicant is encountering discrimination and prejudice in the private sector and is eligible for, and in need of, the benefits available through the Small Business Procurement Program.

The need to account for, or recognize, both long term or short term business cycles is needed to protect otherwise eligible applicants from spikes in their own business fortunes which might become disqualifiers if considered only on an annual basis. Averaging over a two to five year period will help to reduce this potential. Companies dealing in a variety of commodities or services across more than one industry could be impacted by a boom or upward trend in one industry, or stagnation or a reverse trend in another.

Subpart 5 a I (5) recognizes that specific products or activities can be removed from the targeted group category when so designated by the Commissioner, therefore a means of certification that adjusts to these limitations when a company operates over more than one category of commodities or services is needed to prevent decertification of an otherwise eligible company. Should these circumstances arise the applicant has an alternative available by dissembling and differentiating the required financial statements. In this case the full burden for such falls on the applicant and is probably more than is normally required in private sector dealings. No suitable alternative appears feasible however and the number of such requests based on this provision are anticipated to be small. This provision is provided in rule solely for the convenience and accomodation of the applicant as there is no requirement on the part of the Department to develop this provision.

In establishing an appeal process under subpart 6 it must be recognized that the certification requirements have become more complex in order to meet Court directed guidelines. This means that disputes based on facts or the iterpretation of facts are more likely. To shorten the appeal process in order to minimize costs and time constraints on both parties the Commissioner in these cases is now the first point of appeal. The time for appeal has been shortened from 30 days to 15 days and this time has been added to the time limit specified for reaching a final decision. This permits the Commissioner to use the Small Business Procurement Advisory Council for a recommendation. The Council membership is generally from the private sector with small business

interests. Council consideration and recommendation opens the appeal process to other than purely public sector administrative interests and provides the applicant with broader participation in protecting the applicants interests. The rule also expresses the right parties may have to a contested case hearing under Minnesota statutes § chapter 14. It is reasonable for the burden of proof to rest with the applicant as all the facts and the information are in the applicants possession and it is the applicant who seeks certification under this special provision.

Part .1805 Procurements from Socially and Economically Disadvantaged Small Businesses -

A directory is needed to provide the various buyers, purchasing agents, contract administrators, and managers with purchasing or contracting authority, located throughout State agencies, the University of Minnesota and the Metropolitan Council Agencies with information on certification, and status on commodities or services available from socially or economically disadvantaged vendors. The burden of developing, maintaining and distributing the directory rests with the Department.

Part .1810 Proportional Utilization of Socially Disadvantaged Businesses-

Proportional utilization is the goal of the preference program. When the goal is attained the need for preference under the program ceases to

exist. The need for specific purchasing methods under the program is the result of identified non-proportional utilization occuring under normal contract practices specified in the rule under sections .0100 through .1300. The Department, under this rule, is providing those units and personnel who purchase and contract with alternatives to be used in attaining the goal of proportionate purchasing.

Set-aside limits eligible bidders to those certified targeted group small businesses specified in the invitation to bid. Set-aside procedures have been a feature of preference programs throughout the prior history of such programs. The requirement for three competitive bids is a long standing feature of normal bidding procedures directed at ensuring competition and reducing the chances for collusion on the part of vendors and the opportunity for favored "directed" purchasing on the part of buyers or purchasing agents. It is reasonable to maintain these concerns even though set-aside is used.

The preference alternative opens bidding to all responsible bidders on the appropriate state bid lists but provides a percentage factor to the certified targeted group vendor to compensate for higher costs encountered through the impact of discrimination thereby equalizing the field for competitive bid purposes. The preference percentage range of 6% (in part B) is specified in Minnesota Statute §16B.19 subd 2 (c).

None of this prevents non-certified businesses from competing and winning the award outright by low bid or the certified vendor from also doing likewise. The percent of actual preference involved will vary on

each award depending on the bid costs provided by the competing vendors. This can range from none upward to the maximum of 6% as provided by statute.

Part .1820 Required Subcontracting for Construction, Consulting, or Professional or Technical Services.

Goals are needed to ensure proportional use of subcontractors by prime contractors. The Department normally has no direct contact with subcontractors except in the case of "pre-bid" for designated specialties such as mechanical trades when such "pre-bid" procedure is invoked. Therefore, the best means feasible of exerting control is to establish subcontracting goals based on the work to be done and the availability of certified targeted group subcontractors or vendors.

Some subcontractors supply labor as well as materials and supplies while others provide only materials and supplies allowing the prime contractor the option of when, or from whom to supply labor, therefore the provision for a 60%/40% split in credit toward attaining a goal when labor is not furnished recognizes the general relationship, for most work efforts, between these two subcontract elements. The intent is to discourage primes from passing large amounts of materials and supplies through a favorite vendor while doing very little to encourage employment levels among targeted subcontractors. In the same manner the provision requiring the targeted subcontractor to perform at least 75% of the subcontracted work is directed at this concern.

To protect the interests of the prime when faced with impractical, unattainable or unanticipated problems in attaining goals a waiver system needs to be provided for. The process proposed provides for waivers at various stages of the project. Goal requirements may be waived in the request for proposals or invitation to bid issued by the Department. The prime may request a waiver based on unsuccessful efforts in developing the response to the bid or request for proposal. The prime may request a waiver if unforeseen problems arise during the accomplishment of an awarded project. At each step in the process, pre-bid, bid, and project accomplishment the prime is afforded protection from unreasonable or unattainable goals or from unforeseen circumstances.

If penalties for failing to attain goals without a waiver are appropriate, then incentives to exceed what is required should also be necessary. If the bid document invokes the incentive clause, then a prime contractor who exceeds the established goal is entitled to an incentive award. As in the case of penalties, the prime in effect represents the interests of the subcontractor. The percentage and cap to the award are similar to those for penalties and accrue to the prime in accordance with the formula described in the rule. This has the same effect on bid calculations by the bidder as would a 6% preference award to a targeted group vendor or subcontractor who is able to bid directly on the project. The intent is to deliver work and contracts to the targeted group. A prime contractor who exceeds goal requirements is accelerating the process of reaching proportional awards and should be encouraged and supported.

The need to exceed an established goal by 3% and the cap of 25% reflects the accuracy of department proportional representation statistics at + or - 3% and the statutory requirement to deliver at least 25% of all procurement and contracting awards to small businesses. Certified targeted group contractors who obtain awards in open competition without preference, or not under "set-aside", are also eligible for the same incentives.

Penalties are also needed to ensure that goals are attained when the circumstances justifying waiver are not present.

A penalty of 6% not to exceed $60,000 in the case of an awarded contract failing to meet goals without a waiver or in the case of an apparent low bidder not meeting bid or request for proposal goal requirements without waiver is reasonable in that these amounts are similar to what a targeted vendor would receive to win an award if able to bid on the project. The presumption is that, in effect, the targeted subcontractors interests are represented by the good faith efforts of the prime in attaining a goal. A waiver system is available, therefore a prime who does not work within the system to attain goals should not profit nor benefit from such actions. The $60,000 cap on penalties also recognizes that most targeted group vendors or subcontractors would normally not be in competition on contracts over $1,000,000.00 and if they were, would probably not qualify for certification initially based on exceeding size standards for annual gross revenues or sales.

An appeal process on proposed penalties is necessary to protect the prime contractor's interest and is provided in much the same manner as that

provided for certification denials, except that the first step in the appeal goes to the Director of the Materials Management Division. The time limits specified are also similar and intended to ensure an appropriate decision within a reasonable time period. This process, including contested case rights if appropriate, assure due process rights.

Through its directory of certified businesses and the statistical data it keeps for reporting, size standards and proportional purchasing analysis the Division has the best source of information needed to determine if prime contractors are exerting a good faith effort to utilize targeted group subcontractors and vendors; therefore when an unsatisfactory response to a goal is received in bids or in response to a request for proposals, from all parties, cancellation and rebidding is an appropriate alternative.

Part .1830 Preference Procurements from Economically Disadvantaged Small Businesses.

Award of a 4% preference as specified in Minnesota statutes §16B.19 subdv. 2 d, to an economically disadvantaged business is applied in the same manner as the 6% award for targeted group businesses. Preference allowances of both types may be applied to bids and will be so specified in the invitation to bid. This provision encourages all bidders to submit competitive bids since the outcome is not pre-determined. It is necessary and reasonable to use the request for bid document as the primary source for determining how and when the various preference percentages will be used.

Part .1850 Removal from Eligibility Lists or Directory of Certified Businesses.

A certified business may fail to fulfill a contract under the conditions governing state contracts, the penalty for such being removal from the bid listings. Such removal however does not effect its certification status or listing in the directory. Reinstatement to the bid lists is possible under the reinstatement rule for state contracts. All businesses, certified or not, are subject to these requirements.

Removal from the certified directory, however, requires specific circumstances as outlined in the rule. Removal from the directory does not imply removal from bid lists - the two are not interlinked. Decertification and removal from the directory occurs when changes in the owners or businesses circumstances, which originally led to certification no longer qualify, such as exceeding size standards, loss of labor surplus, or median income county status. In the case of loss of economically disadvantaged area status the 120 day period of remaining effectiveness after notice which coincides with the federal standard is maintained in this rule so as to eliminate confusion as to qualifying dates since the labor surplus designation is made by the federal government. Changes in ownership or control, citizenship, or principal place of business are other examples requiring a review of certification status. The appeal process is similar to others in the rule in so far as timing and decision limitations are concerned, but in this case offer the appellant an option for an informal or formal review. The certification process has, out of necessity, become so complex, that matters of fact may more often be involved, so an

alternative to go directly to a formal review is provided, in order to reduce the time involved in resolving status.

Part .1860 Limits to Program Participation

One of the court requirements contained in Croson v. City of Richmond, previously cited, is that preference programs cannot be open-ended and that a resolution or termination point is needed for a valid program. All of the limitations provided in the rule are meant to recognize this requirement. It is also reasonable to state that the public sector should not be the sole source of revenue for business enterprises and that the limitations should be directed at ensuring businesses develop multiple sources of revenue. This is necessary so as to act as a buffer to changes in the availability of public monies or projects and the changing economic cycles in the private sector; therefore annual limitations on revenues from individual public sources are reasonable when those sources of revenues are gained through preference or set-aside. The three-tenths of one percent limitation existed in the previous program and proved effective so it was incorporated into the new rule. Applying the 3/10ths limitation to individual agency determinations is needed in that the accounting and tracking systems used by these entities are not integrated and cannot respond, at this time, to day-to-day determinations, therfore each agency will monitor and apply this limitation as it effects its own operation. In no way, however, is any limitation placed on any vendor in obtaining awards through the normal competitive process despite these limitations.

Businesses are recertified on an annual basis. When financial statements or Department reports indicate the source of gross revenues or sales exceeds the percentages specified in the rule, the business shall be decertified; again no limitations are placed on awards acquired through the normal competitive bid process. The percentages specified place no limit on the first year of operation when most businesses need all the assistance available but does gradually reduce or "wean" the enterprise over time, encouraging the business to find other sources of revenue.

Graduation from the program is another Court specified requirement; therefore in addition to the other means of decertification limiting participation, removal can occur when targeted groups attain a proportional share of awards, or an individually certified business exceeds the proportionate market share specified in the rule. The percentages used reflect the need to encourage a business in its initial year, and, as in awards gained under set-aside or preference reduce the reliance of the business on the public sector for its major share of sales or gross revenues. The percentages also recognize that over time in a new endeavor, in a new field, or an established endeavor in a stable or stagnant field that proportionate market shares may tend to become fixed. It is necessary to emphasize that the program is directed at helping small businesses survive and become viable, not in helping them to dominate the market.

Part .1900 General Terms and Conditions.

Inability to perform a contract for reasons beyond its control should not result in a punitive environment for a contractor, therefore remedial

assistance is a preferred option. The rule provides an opportunity for this assistance from qualified or responsible sources. The Division also has the option to postpone the award or completion of contract when circumstances permit so as to avoid loss of the awarded contract to the successful bidder while remedial actions are underway. The businesses record as a responsible bidder shall not be prejudiced unless the business fails to cooperate in the action of either the Division or the Department of Trade and Economic Development as provided for under Minnesota statutes §16B.20 subdv. 2. In such cases the handling of the problem shall revert to the regular procedure specified by rule for failure to perform.

Annual verification of data on file for a socially or economically disadvantaged business is needed so that the various provisions for size standards, limitations, graduation and ownership/affiliation requirements may be met. The process will involve verification of data on file with the Division and submission of any new data or changes applicable. This should limit the reporting requirement to only those items effected and minimize the burden on the business involved. Certification integrity is based on a cooperative exchange of information, failure to respond is sufficient grounds for removal from the directory.

Part .1910 Consultant, Professional and Technical Procurements

This part recognizes the role of individual agencies in managing and awarding these types of contracts and requires that the same criteria be applied to such awards. It also recognizes that some of this type of work is accomplished on an individual non-business related basis and exempts

such individuals from certification requirements but does require the agency involved to maintain records of such action and report the dollar amounts so awarded to the Department.

Repealer. Minnesota Rule 1230.0200 definitions has been renumbered as part .0150 by the revisor.

Part .0400 subpart 1 and 3 "invitation to bid" and "form and delivery" of bids have been repealed in that the process is too descriptive and proscriptive; repealing such provisions permits the Department the option of applying new technology and media advances when such is effective and feasible.

Part .0700 subpart 2 "recording and tabulation of bids" was repealed for the same reasons as stated above under part .0400.

Part .1500 - "scope" renumberd Part .1450 by the revisor and all subparts providing "definitions" relocated to part .0150.

Part .1700 subparts 2 and 3. " grounds for claiming disadvantaged status" and "income statement" have been superceded by new statutory terminology and requirements so are repealed as outdated, superfluous or redundant.

Part .1800 "establishment of set-aside procurements" repealed for the same reasons as shown under part .1700.

Part .1900 subparts 2, 3, 4 and 6. "Removal for set-aside list for failure to fulfill contract"; "removal from list when business no longer qualifies"; "appeal of removal"; and "subcontracting have been repealed for the same reasons as shown under part .1700.

Parts .2000 through .2300 "partial indemnification program" are repealed as this is no longer an operating program.

Impact on Small Business:

Minnesota statute §14.115 requires an agency to consider the impact of proposed rules on small business and to consider certain methods for reducing the impact of the rule on those businesses.

The Department considered all of the methods listed in §14.115 subdv. 2, for example, to the extent possible the Department established less stringent disclosure requirements. All of the information and disclosures required are necessary to determine if the business qualifies for the program. The financial information required should normally be in the hands of the business in order to conduct its day-to-day operations and to meet its annual reporting requirements to taxing authorities or to respond to private sector financial institutions when seeking assitance in that sector.

To require less information or reporting requirements for small businesses would controvene statutory objectives and direction that the benefits of the program be delivered only to legitimate qualified small businesses. The same need is also required to meet judicial "tests" outlined for such programs operated and administered by state and local governments.

In addition; the adoption of these proposed rules will not require expenditure of public money by local public bodies nor will it have any impact on agricultural land, therefore Minnesota statute §14.11 is not applicable.

Summarization

The rules proposed in parts .1400 through .1910 reflect the provisions of the Statute and are structured to carry out those provisions while maintaining the documentation needed, and the integrity of the program, as called for in the U.S. Supreme Court guidelines for the adoption of, and operation of, such preference based programs by state and local governments. The need for targeted groups, proportionate purchasing, limitations, and graduation all respond to the court requirements. The procedure for removal from bid lists, decertification or removal from the directory protect the State's interests and responsibility for management of public funds. The appeals processes provided protect the interests of the vendors and contractors in the private sector against arbitrary state decisions and prolonged administrative procedures. The program ensures that the assistance benefits intended for socially or economically disadvantaged groups by the legislation are delivered to those groups only. It also provides incentives for private sector actions in assisting to carry out the program and penalties for those who hamper or refuse to abide with the requirements. It meets the needs of the public sector, the court requirements and the legislative authorization. These rules are a reasonable balance of the interests of the parties involved and are directed at promoting cooperation and minimizing conflict in a fair and well defined process.

Dana B. Badgerow
Commissioner of Administration

April 1, 1991
Date

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Adoption of Rules of the State of Minnesota, Department of Administration Governing the Revision of Minnesota Rules, Chapter 1230.0100 to 1230.1910 Relating to State Contracts and Relating to the Small Business Procurement Program

DECLARATION OF COUNSEL

I, CHARLENE W. HATCHER, Special Assistant Attorney General, do hereby declare that I have examined the above-captioned rules and the supporting rulemaking record, and that, based on my examination, the Administrative Procedures 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.

Charlene W. Hatcher/mjcassedy

CHARLENE W. HATCHER
Special Assistant
Attorney General

Dated: ~~July~~ June 28 1991.

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Rule of the State Department of Administration Governing the Procurement of Materials and Services for the State and the Small Business Procurement Program.

Findings of Fact, Conclusions, and Order Adopting the Rule without a Public Hearing.

1. Notice of the Commissioner's intent to adopt the above entitled rule was published in the State Register on April 1, 1991 and was sent by United States mail to all persons on the list maintained by the department pursuant to Minnesota Statutes, sections 14.14, subdivision 1 (a) and 14.22 on April 1, 1991.

2. The statement of need and reasonableness was prepared before the notice of intent to adopt a rule without a public hearing was mailed to all persons on the rulemaking mailing list and published in the State Register and was available to the public.

3. Since the proposed rule did not establish or adjust fees, notification of the House Appropriations Committee and Senate Finance Committee was not required.

4. All persons were given the opportunity to submit comment on the rule for 30 days after notice of proposed rulemaking. An amendment to the notice that was published in the April 1, 1991 State Register was published in the State Register on April 8, 1991. This amendment also extended the original 30 day comment period by seven days. All those persons notified by United States mail on April 1, 1991 were also mailed the amendment, and notice extending the comment period, on April 4, 1991.

5. The Department received five (5) requests for a public hearing, none were subsequently withdrawn. Therefore, the Department did not receive requests for a public hearing from 25 or more persons which were not withdrawn. In addition one letter commenting on the rule was received by the Department. No requests for notice of submission to the Attorney General were received by the Department.

Therefore, based on the comments and evidence in the record before the agency, I find the following:

A. Several non-substantial changes in the proposed rule, as published in the April 1, 1991 State Register, are necessary to remove ambiguity, to clarify statements, or cite correct references and to ensure that the rule conforms to existing statutes and similar state or federal programs.

B. 1230.0150 DEFINITIONS, Subpart 10. - is necessary to correct reference citation from Subpart 24 to Subpart "26". This change is non-substantial.

C. 1230.0150 DEFINITIONS, Subpart 24, C. - definition of "disabled" rewritten to conform with that existing in Minnesota § Chapter 363; (363.01 Subdivision 13). The proposed definition was based on prior statute and rule, the new statute does not provide for a more restrictive definition of disability therefore it is necessary to provide a definition equal to that established under the human rights statute. This change is non-substantial in that it conforms to standards already established by law.

D. 1230.0500 BID SECURITY, Subpart 1. - the words "if any" were added to the proposed rule and are necessary to indicate and clarify that not all invitations to bid require security. Since, in all cases the bid invitation will set forth security requirements this change is non-substantial.

E. 1230.1100 FAILURE TO PERFORM, Subpart 2. - removal of "and this subpart" is necessary to eliminate redundancy and as such is a non-substantial change.

F. 1230.1150 AUTHORITY TO DEBAR OR SUSPEND VENDORS, Subpart 1. - removal of "for a minimum of one year" is necessary to remove conflict with the definition of suspension in 1230.0150, Subpart 22 which specifies - "not to exceed six months" since the latter is a less severe action and places the burden for prompter action on the director, this change is considered non-substantial.

G. 1230.1600 ELIGIBILITY FOR SOCIALLY DISADVANTAGED OR ECONOMICALLY DISADVANTAGED AREA SMALL BUSINESS PROGRAM, Subpart 3. - removal of "in Minnesota" in (3) and (5) and the addition of "for the purposes of this program" in (3) is necessary to clarify that the definition of small business based on gross revenues or sales applies to this program only as other definitions do exist in Minnesota Statute and rule for other purposes. This clarification is considered non-substantial in application.

H. 1230.1700 CERTIFICATION OF ELIGIBILITY, Subpart 1, B. (1) and (2) - the elimination of "as a" and insertion of three semicolons is needed to structure the sentence for ease of reading and to clarify the small business categories described under B. In (1) the insertion of the words "the" and "rules" completes the sentence and along with substituting "1230.0150" for 1230.1550 provides the appropriate citation. The same citation correction, "1230.0150" for 1230.1550 is necessary under (2) each of these deletions and changes is non-substantial in effect.

I. 1230.1700 CERTIFICATION OF ELIGIBILITY, Subpart 1, F. (2), (a) - changing not to "note" is needed to correct a typographical error and to describe the information needed. This change is non-substantial.

J. 1230.1700 CERTIFICATION OF ELIGIBILITY, Subpart 1, I. - changing 7 to "6" is necessary to provide the correct reference and is non-substantial in effect.

K. 1230.1700 CERTIFICATION OF ELIGIBILITY, Subpart 5 a, B. - elimination of the word "that" in the last sentence is necessary to remove a superfluous word from the sentence composition to promote clarity. This change is non-substantial.

L. 1230.1810 PROPORTIONAL UTILIZATION OF SOCIALLY DISADVANTAGED BUSINESSES - Subpart B, (2) and (3) - elimination of six and substituting "the specified" percent is necessary to correct a problem in both (2) and (3) in that the statute permits a preference of up to six percent. The actual preference to be granted, if any, will be specified in the invitation to bid. This change is necessary to remove any ambiguity between the bid preference announcements and the actual figure to use in determining low bidder for award purposes. This conforms the rule to the language of the statute and is non-substantial in practice.

M. 1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES, Subpart B and C, - elimination of four and substituting "the specified" percent is necessary for the same reasons as cited in L. above. The statutes provides for a preference of up to 4 percent, if any. This change is non-substantial in practice.

N. 1230.1830 PREFERENCE PROCUREMENTS FROM ECONOMICALLY DISADVANTAGED SMALL BUSINESSES, Subpart D. - substituting "bids" for bid, and "businesses" for business corrects a grammar error in the sentence and is needed to clarify that more than one bid, with a different preference authorized, is involved. This change is non-substantial in practice.

O. 1230.1850, REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES, Subpart 2. - elimination of "that" and inserting "1" after subpart is necessary to provide the appropriate reference. This change is not substantial.

P. 1230.1850, REMOVAL FROM ELIGIBILITY LISTS OR DIRECTORY OF CERTIFIED BUSINESSES, Subpart 3. - substituting "the programs" for these preference program is needed to clarify intent. This change is not substantial.

Q. 1230.1900, GENERAL TERMS AND CONDITIONS, Subpart 1. - substituting "therefore" for therefor provides the preferred spelling and is considered a non-substantial change.

None of the items above, A through Q, are considered substantial in that each change does not effect classes of persons not impacted by the proposed rule as advertised; no new subject matter has been introduced and none of the changes are likely to invite reaction as contrasted to the proposed rule as originally noticed.

(8)

Therefore; the above-captioned rule is found to be needed and reasonable.

Now, therefore, it is ordered that the rule identified as the Rule of the Department of Administration Governing the Procurement of Materials and Services for the State and the Small Business Procurement Program, as modified is adopted this 24th day of June, 1991 pursuant to authority vested in me by Minnesota Statutes, Section 16 B.

(9)

Name: Hans B. Berglund

Title: Commissioner of Administration

Department of Administration

Proposed Permanent Rules Relating to Business

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.

1230.0150 DEFINITIONS.

Subpart 1. **Scope.** Within parts 1230.0100 to 1230.1910, the following apply, unless clearly indicated otherwise by the context.

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. 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 contractor, subcontractor, supplier, consultant, or provider of technical, administrative, or physical services organized as a sole proprietorship, partnership, association, corporation, or other entity formed for the purpose of doing business for profit.

Subp. 5. **Contractor.** "Contractor" means a business that

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is engaged in construction such as general, mechanical, 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 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 a contract by a governmental body, for a specified 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 Materials Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means an operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, that does not provide the operator with the exclusive right to profit from the operator's 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. **Joint venture.** "Joint venture" means the temporary association of two or more businesses to secure and fulfill a procurement bid award. For awards under the preference or set-aside provisions of the small business procurement program in parts 1230.1400 to 1230.1910, all parties in the joint venture must be certified as targeted groups or

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economically disadvantaged area businesses.

Subp. 12. **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. 13. **Manufacturer.** "Manufacturer" means a business that makes or processes raw materials into a finished product.

Subp. 14. **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. 15. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions that allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 16. **Open market.** "Open market" means purchases made in the marketplace without the need for competitive bids.

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

Subp. 18. **Principal place of business.** "Principal place of business" means the primary 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 on which debarment ends by submitting an application to the director. If a debarred vendor is restored to the state bidders lists, the vendor will be subject to a one-year probationary period.

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

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

B. if services are to be provided, has the necessary

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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 a contract as evidenced by the ability to obtain bonding when required; and

D. has no unresolved 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, or operated under false names or fronts as a small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota, as evidenced by timely filing of all required returns, reports, payments, and possession of all applicable stamps, licenses, or other permits, and freedom from any judgment, lien, or seizure of assets or property to satisfy tax payments or duties; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G within 30 days or less or within a reasonable amount of time determined by prior consensus between the bidder and the division.

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

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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 exceed six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means 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.** The terms in items A to C have the meanings given them for purposes of administering the small business procurement program.

A. "Racial minority" means persons in one or more of the categories in subitems (1) to (5).

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

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

(5) "Indian" means persons having origins in any of the original peoples of North America who are enrolled members of Indian tribes recognized by the governments of the United States and Canada.

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

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C. "Persons who have suffered a substantial physical disability" means 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 the person's 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 an individual, partnership, corporation, joint venture, association, or cooperative that is 51 percent owned and is operationally controlled on a day-to-day basis by citizens of the United States.

1230.0300 SOLICITING BIDS.

Subpart 1. **Publication.** Any purchase estimated to exceed ~~$15,000~~ the limits established by Minnesota Statutes, section 16B.07, subdivision 3, shall be purchased on sealed bids, notice of solicitation of bid ~~to be inserted once in a newspaper of general circulation~~ will be advertised at least seven days prior to the bid opening date. Bids shall also be solicited by sending bid invitations to ~~all~~ prospective bidders registered with the division ~~of Procurement~~ pursuant to subpart 3 ~~and by posting notice on a public bulletin board in the Division of Procurement Office at least five days prior to the bid opening date~~.

Subp. 2. **Open market.** Any purchase estimated to be ~~$15,000 or~~ less than the limits established by Minnesota Statutes, section 16B.07, subdivision 4, may be made upon competitive bids or in the open market~~, but in either case will be based on three competitive bids, so far as practicable~~.

Subp. 3. **List of bidders.** A list of bidders shall be

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maintained by the division ~~of Procurement~~ for various ~~commodity classes~~ commodities and services. ~~Any~~ Persons desiring to sell ~~supplies~~ commodities or provide services to the state may ~~file with the director of procurement a letter showing their business address, the commodities they desire to sell to the state, and proof of incorporation or registration to do business in the state~~ request a vendor registration application. Upon approval of the application by the division as meeting the requirements in part 1230.0150, subpart 20, the ~~firm~~ vendor's name shall ~~then~~ be placed on ~~the permanent~~ appropriate bid ~~list~~ lists to receive invitations to bid. The name of a ~~bidder~~ vendor who fails to respond to three consecutive bid invitations ~~shall~~ will be removed from the ~~list~~ lists of bidders ~~upon written notice~~. The name of the ~~bidder~~ vendor so removed ~~shall~~ will be restored only ~~by~~ through specific written request from the vendor.

1230.0400 SUBMISSION OF ADVERTISED BIDS.

Subpart 1. [See repealer.]

Subp. 2. **Bid conditions.** General bid conditions applicable to all state purchases shall be stated on the standard invitation to bid. Special bid conditions applicable to specific commodities or types of purchase shall be stated in the invitation to bid. ~~Special conditions supersede general conditions, if conflicting~~ In the event of conflict between general bid conditions and special bid conditions, the special bid conditions will govern.

Subp. 3. [See repealer.]

1230.0500 BID SECURITY.

Subpart 1. **Payment.** Each bid invitation shall set forth the bid security required by the division. Such bid security shall be made payable to "State of Minnesota" and shall be made upon the condition or guarantee that in the event the bidder's offer is accepted, the bidder shall enter into contract in accordance with the proposal.

Subp. 2. **Forfeit.** Certified checks or bid bonds of

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successful bidders shall constitute liquidated damages for failure of a bidder to enter into a contract, and shall also be held as security for delivery and acceptance of merchandise, or satisfactory completion of the contract. A performance bond for 25 percent of the award may be substituted.

Subp. 3. **Return.** Bid security checks of unsuccessful bidders shall be returned to vendor by placing them in the mail within five working days after an award is made. Bid security checks of successful vendors shall be returned as soon as delivery is completed and acceptance is made by the agency, or the contract is satisfactorily completed. No interest shall be paid on any ~~moneys~~ money held as security.

Subp. 4. **Annual bid and supply bond.** Bidders may file with the director ~~of procurement~~ an annual bid and supply bond in lieu of individual bonds or other security required in various individual bid invitations. Annual bid and supply bonds, when accepted by the director ~~of procurement~~, shall cover all bids by the vendor for materials, commodities, and supplies during the effective period of the annual bond, except as provided in subpart 5. The vendor shall be notified in writing if the necessity arises to attach the bond for breach of contract.

Subp. 5. **Bids excluded from annual bid and supply bonds.** Annual bid and supply bonds shall not cover ~~bid~~ bids:

A. for building construction, repair, remodeling, or other public works;

B. on which the annual bid security does not amount to five percent of the bid;

C. when another bond is required by specification; or

D. when bond is used as security on other bids.

1230.0600 BIDDER ERRORS.

Prior to the opening of sealed bids, any person may withdraw ~~his~~ a bid by notifying the director in writing of ~~his~~ the desire to withdraw, by appearing in person at the division ~~of Procurement~~ office and withdrawing the bid, or by

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telegraphic writing or facsimile received by the director requesting withdrawal of ~~his~~ the bid.

Subsequent to the opening of sealed bids, a person may withdraw ~~his~~ a bid only upon a showing that an obvious error exists in the bid. The showing and request for withdrawal must be made in writing to the director within a reasonable time after the opening of the bids and prior to the state's detrimental reliance on the bid.

1230.0700 OPENING OF BIDS.

Subpart 1. **Division's treatment of bids.** Upon receipt in the division ~~of Procurement~~, all bids will be time stamped, showing the date and hour received. Bids received after the time set for the opening of bids will be returned unopened to the bidders. Bids shall be opened publicly and read aloud at the time and place established in the bid invitation. ~~All original bids will be retained pursuant to Minnesota Statutes, section 16B.07, subdivision 3, for public inspection in the Division of Procurement.~~

Subp. 2. [See repealer.]

Subp. 3. **Rejection of bids.** The state may reject any or all bids or portions thereof. All bids shall be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, or insufficient state funds. A vendor whose sealed bid is rejected shall be given notice of the rejection and the reason(s) for rejection of the bid.

Subp. 4. **Informalities and minor deficiencies.** The state reserves the right to waive minor deficiencies or informalities in bids. Minor informalities shall be waived if, in the judgment of the director ~~of procurement~~, the best interest of the state would be served without prejudice to the rights of the other bidders. Examples of minor deficiencies include, but are not limited to, omission of the title of the signatory; failure to furnish required catalog cuts; and minor detail omissions.

1230.0900 TIED BIDS.

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Subpart 1. **Resolving tied bids.** Tied low bids for less than $500 shall be resolved by drawing lots among the tied low bidders, except as provided in subpart 2.

Except as provided in subpart 2, tied low bids for $500 or more shall be referred to the director ~~or assistant director of procurement~~ for disposition. The director ~~of procurement~~ may enter into negotiation with tied low bidders when the director deems such action to be in the best interest of the state.

Subp. 2. **Preference for Minnesota firms.** Whenever a tie involves a Minnesota firm and one whose place of business is outside the state of Minnesota, preference shall be given to the Minnesota firm.

1230.1000 CONTRACT PERFORMANCE.

Subpart 1. **Shipment.** The director ~~of procurement~~ or authorized agents of state departments shall place orders with successful bidders using official state purchase orders. Upon award, shipment shall be made in accordance with delivery instructions in the invitation to bid.

Subp. 2. **Inspection.** The state may require that the vendor permit inspection of the commodities prior to shipment at the factory, plant, or establishment where produced, manufactured, or stored. Unless provision for inspection is made in the invitation to bid, costs thereby incurred will be paid by the state.

Subp. 3. **Grounds for rejection.** All deliveries shall conform to specifications of the bid. Failure in this respect shall be cause for rejection of the goods. Commodities that fail to comply with specifications, fail to conform to the vendor's sample, are not as provided on the purchase order, or arrive in an unsatisfactory condition shall be rejected except as provided in subpart 7.

Subp. 4. **Notice of rejection.** Notice of rejection, based upon apparent deficiencies disclosed by ordinary methods of inspection, shall be given by the receiving agency to both vendor and the carrier (if f.o.b. shipping point) within

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reasonable time after delivery, with a copy of this notice to the division ~~of Procurement~~. A revocation of acceptance for latent deficiencies that would make the items unsatisfactory for the purpose intended shall be given by the state within reasonable time after discovery. The contractor shall satisfactorily repair or replace such items within a reasonable ~~period of~~ time.

Subp. 5. **Removal of rejected items.** The vendor shall ~~forthwith~~ remove at ~~his~~ the vendor's expense any item rejected by the state. If the vendor fails to remove ~~such an item, or to forthwith forward~~ the items and instead forwards shipping instructions to the agency concerned, the state need not comply, but may sell the item and remit the proceeds of sale, less the expense involved, in accordance with law, including but not limited to, Minnesota Statutes, section 336.2-603.

Subp. 6. **Replacing rejected items.** If the needs of a state agency do not permit time to replace rejected merchandise, or if deliveries are not made within the time specified in the contract, the agency may, with the approval of the director ~~of procurement~~, buy on the open market supplies of the nature required. The vendor shall be liable for all additional costs and expenses.

Subp. 7. **Adjusting price of nonconforming items.** If it is determined that an item does not conform strictly to specifications, but can be used satisfactorily, the director ~~of procurement may adjust the price,~~ with written acquiescence of the vendor, may adjust the price and authorize the agency to keep and use such part of the order when such action is required to sustain continued operation.

Subp. 8. **Laboratory tests.** The director ~~of procurement~~ may ~~direct~~ require that a laboratory analysis or other tests be made to determine the acceptability of the delivered product(s) and to ensure that those product(s) meet specifications. ~~In these instances~~ When analyses or tests are required, acceptance by the state shall not occur nor be deemed to have been made, ~~and the discount time shall not begin,~~ until testing is

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completed and affirmative results are obtained. Any discount time applicable shall begin after affirmative results are obtained. Vendors shall be notified of unsatisfactory test results.

1230.1100 FAILURE TO PERFORM.

Subpart 1. **Penalties.** If a bidder who is awarded a contract fails to perform as specified, the bid security as described in part 1230.0500, subpart 1, shall be retained by the state and deposited with the state treasurer as liquidated damages. The vendor may also be determined not to be a responsible bidder. The state may also pursue all other remedies permitted by rule or provided by law.

If the bid security is in the form of a bond, the bonding company shall be notified in writing of the default. A vendor who fails to enter into contract that has been awarded to him may be determined not to be a responsible bidder regardless of whether bid security was required. The state may seek further damages and shall not be limited by the absence or existence of a bond. In all cases of default, the vendor may be determined not to be a responsible bidder.

Subp. 2. **Failure to furnish security.** After the award of a contract, if performance security is required and the vendor fails to furnish satisfactory performance security, ~~if required,~~ the vendor shall be ~~deemed~~ considered in default and subject to ~~the above provisions~~ subpart 1 and this subpart.

Subp. 3. **Types of failure to conform to specifications.** A vendor shall be held in default for failure to conform to bid specifications or standard commercial practices including, but not limited to the following:

A. failure to make deliveries within the time specified in the contract; or

B. deliveries of goods or materials that do not conform to samples or specifications ~~and are not promptly replaced~~; or

C. delivery of goods or materials that are ~~repeatedly~~

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rejected; or

D. misbranding or materially misrepresenting goods or materials purchased under the contract.

1230.1150 AUTHORITY TO DEBAR OR SUSPEND VENDORS.

Subpart 1. **Suspension.** After written notice to the person involved and providing for a reasonable opportunity for that person to be heard, the director shall have the authority to suspend a person from consideration for awards of contracts for a minimum of one year if the director determines that the person has engaged in an activity that might lead to debarment.

Subp. 2. **Debarment causes.** A vendor shall be debarred if one or more of the following occurs:

A. conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

B. conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor;

C. conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation of contract provisions, as set forth in subitems (1) and (2), of a character that is regarded by the director to be so serious as to justify debarment action:

(1) failure without good cause to perform according to the specifications or within the time limit provided in the contract; or

(2) a recent record of failure to perform, or of unsatisfactory performance, according to the terms of one or more contracts; provided that this failure to perform or unsatisfactory performance was not caused by acts beyond the control of the contractor; or

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E. any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including, but not limited to, collusion with other bidders to restrain competitive bidding, giving false information on a bidder's application, and all acts that would disqualify the person as a responsible bidder, as defined in part 1230.0150, subpart 20, including debarment by another governmental entity.

In the case of debarment by other governmental entities, should that debarment result from action by the federal government, the state of Minnesota, or any of its departments, commissions, or agencies, or any of its political subdivisions, the terms and limits of that debarment are automatically effective for parties so debarred in doing business with the division. Debarments by other governmental entities are cause for suspension until a determination can be made by the division under normal suspension procedures as to whether the debarment applies under Minnesota statutes and rules.

Subp. 3. **Written notice.** A written notice to debar or suspend shall be furnished to the affected parties and shall:

A. state the reasons for the action taken;

B. give the length of time the vendor will be debarred; and

C. inform the debarred or suspended person of the person's rights to administrative and judicial review according to subpart 4.

Subp. 4. **Suspension or debarment appeals.** If suspended or debarred, a person may file an appeal in writing with the commissioner of administration within 30 days of receipt of a decision to suspend or debar. The commissioner shall, within 45 days, decide whether the actions taken were according to statutes and regulations and were fair and in the best interest of the state.

Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

Subp. 5. **Length of debarment.** A bidder may be debarred

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from receiving and submitting bids for not less than one year, nor more than three years. The length of the debarment will depend on the vendor's past performance, the number and seriousness of the current complaints, and the cost to the state associated with correcting the problem.

Subp. 6. **Public list of debarred.** The division shall maintain a master list of all suspensions and debarments. The master list will retain all information concerning suspensions and debarments as a public record. The records will be maintained for at least three years following the end of a suspension or debarment. Such public information may be considered in responsible bidder determinations according to part 1230.0150, subpart 20.

1230.1175 REINSTATEMENT AND PROBATION.

Subpart 1. **Review of reinstatement applications.** The director will review vendor applications for reinstatement.

Subp. 2. **Application for reinstatement time limits.** A person who has been debarred may not seek reinstatement until one year from the end of the debarment period.

Subp. 3. **Information in reinstatement application.** A request for reinstatement must be made to the director in writing and include:

A. all information necessary to qualify as a responsible bidder, as defined in part 1230.0150, subpart 20;

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

C. 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

D. a written narrative outlining all steps taken to ensure that the cause for debarment has been corrected with appropriate supporting documentation.

Subp. 4. **Actions following decision.** The director will

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determine if the person can be reinstated as a responsible bidder and be added to the bidders list. If, after investigation, the petitioner's request for reinstatement is denied, the person cannot reapply for reinstatement for one year from the date of denial. If reinstated, the petitioner will be placed on the bidders list and be subject to a one-year probationary period.

Subp. 5. **Probationary periods and conditions.** Vendor probationary periods apply to formally debarred persons who have been reinstated as responsible bidders.

The length of the probationary period will be one year from the date of reinstatement.

During the probationary period, the party on probation must respond to all bid requests received from the division.

If a bid from a vendor on probation is accepted and the vendor refuses to perform or enters into a contract and performance is substandard, the performance or supply bond, if any, will be retained and the vendor will be deemed not to be a responsible bidder and will be permanently removed from the list of bidders.

1230.1200 CONTRACT CANCELLATION.

The director ~~of procurement~~ may cancel a purchase entered into under competitive bidding under any one of the following conditions including, but not limited to:

A. the contractor agrees to the cancellation;

B. the contractor has obtained the contract by fraud, collusion, conspiracy, or in conflict with any statutory or constitutional provision of the state of Minnesota; ~~or~~

C. failure to deliver as agreed; or

D. failure to deliver within the time period stated in the invitation to bid.

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

1230.1400 PURPOSE.

Parts ~~1230.1300~~ 1230.1400 to ~~1230.1900~~ 1230.1910 are

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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.

1230.1450 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern. The definitions contained in part 1230.0150 shall apply in the administration of these preference programs.

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

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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

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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 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

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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:

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(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

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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,

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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

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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

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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

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(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~~

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~~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

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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 and expertise 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

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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

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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

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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

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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~~

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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 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.

1230.1805 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

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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 will depend 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

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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

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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

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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 director or the director's designee. The director may uphold, modify, or reject the penalty. The decision of the director 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 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.

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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 as specified in parts 1230.1000 and 1230.1100.

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 according to part 1230.1175.

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

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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 certified directory under subpart 3, 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 certified directory was reasonable and whether the removal is in compliance with subpart 3. 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 to the 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

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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

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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

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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 parts 1230.1000 and 1230.1100. The records of the division

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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~~ 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 division, before or after the annual reporting requirement date.

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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 1230.0150, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.0200; 1230.0400, subparts 1 and 3; 1230.0700, subpart 2; 1230.1500; 1230.1700, subparts 2 and 3; 1230.1800; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300, are repealed.

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by Revisor _____

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Business

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

Stat Authority

16B.04

Subject to chapter 14, the commissioner may adopt, amend, and rescind rules relating to any purpose, responsibility, or authorization in this chapter

16B.18

Sheltered Workshops, Procurement of Products and Services, Work Activity Programs

The commissioner . . .

16B.19

Designation of Procurements from Small Business

16B.22

Eligibility Rules

(a) A small business wishing to participate in the program under section 16B.19, subdivisions 2a to 2d, must be certified by the commissioner. The commissioner shall adopt by rule standards and procedures for certifying that small business, ,,,

(b) The commissioner may make rules which exclude or limit the participation of non manufacturing business

(c) The commissioner may make rules that set time limits and other eligibility limits on business participation

Notice of Intent

Notice of intent each in writing - there is nothing in 2010.030 E (3) which state that the comment must be in writing

Solar

12.30.150 subd 2 - Statement cause Each of the causes are not specified why they are reasonable

12.30.175

Very Very difficult to find rules with the organization of the rules 5a A - H not very well subdivided in the SOAR

These rules are hard to understand

SF-00006-05 (4/86)

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT : of Administration

DATE : June 25, 1991

TO : Ms. Charlene Hatcher
Office of the Attorney General

FROM : Department of Administration, Materials Management Division

PHONE : 296-5305

SUBJECT : Proposed Rule Concerning the Procurement of Materials and Services for the State and the Small Business Procurement Program.

The enclosed package is forwarded for your review and action. The proposed rule is being adopted without a public hearing in that the required number of requests (25 or more) were not received after appropriate notice per Minnesota Statute §14.25.

This package contains the following documents:

1. Order adopting the rule with appropriate findings and conclusions.

2. Affidavit on notice advising of submission to Attorney General.

3. Copy of notice of solicitation of outside information or opinions as published in State Register on January 28, 1991.

4. Petition for adoption, suspension, amendment or repeal of rule - not applicable.

5. Certificate of multi-member agency authorizing resolution - not applicable, no document.

6. Copy of rule with certificate of approval as to form by the revisor.

7. Notice of intent to adopt a rule without a public hearing.

8. Statement of need and reasonableness.

9. Affidavit of mailing the notice of intent to adopt a rule without a public hearing, and the subsequent amendment of that notice.

10. Copy of the notice of intent to adopt the rule without a public hearing as published in the State Register.

10.a Copy of the amendment to the notice of intent to adopt the rule without a public hearing as published in the State Register.

11. Four copies of rule as adopted with modifications.

12. Certificate of resolution by multi-member agency - not applicable, no document.

13. Written requests, submissions or comments received on the proposed
rule (5).

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Rule of the State Department of Administration Governing the Procurement of Materials and Services for the State and the Small Business Procurement Program

Affidavit on Notice Advising of Submission to Attorney General

State of Minnesota)
) ss.
County of Ramsey)

Robert J. Baldwin, being sworn says:

I hereby certify that no requests in writing were received to be advised by mail when the subject rule adopted without a public hearing was submitted to the Attorney General of the State of Minnesota per Statute §14.26.

Robert J. Baldwin
(Name)

MANAGEMENT ANALYST
(Title)

Subscribed and sworn to before me

this 25 day of June, 1991.

Joyce Dehn

JOYCE DEHN
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
My Comm. Expires May 22, 1993


JOYCE DEHN
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
My Comm. Expires May 22, 1982

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 Rule Governing State Contracts

NOTICE IS HEREBY GIVEN that the State Department of Administration is seeking information or opinions from sources outside the Department in preparing to propose the amendment of the rule governing State contracts Chapter 1230. parts .0100 through .1300, and the permanent adoption of the emergency rule currently in effect governing the Small Business Procurement Program parts .1400 through .1910 the adoption of the rule is authorized by *Minnesota Statutes*. section 16B.04, which permits the Department to adopt, amend, and rescind rules relating to any purpose, responsibility, or authorization in (that) Chapter (16B), specifically, "contracts and purchases" and "special purchasing situations" such as "designation of procurements from small businesses".

The State Department of Administration requests information and opinions concerning the subject matter of the rule, Chapter 1230.0100 through .1910. Interested groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Robert J. Baldwin
Department of Administration
Materials Management Division
Administration Building, Room #112
50 Sherburne Avenue
St. Paul, Minnesota 55155

Oral statements will be received during regular business hours, 8:00 a.m. to 4:30 p.m., Monday through Friday over the telephone at (612) 296-2600 and in person at the above address.

All statements of information and opinions shall be accepted until February 15, 1991. Any written material received by the State Department of Administration, Materials Management Division shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law Judge in the event that the rule is amended and adopted.

Dated: January 18, 1991

Terry L. Bock
Acting Commissioner of Administration

Office of Attorney General

Public Finance Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rule Governing the Attorney General's Review of Rules Without a Public Hearing

NOTICE IS HEREBY GIVEN that the State Attorney General's Office is seeking information or opinions from sources outside the agency in preparing to propose the amendment of the rule governing the Attorney General's review of rules without a public hearing.

The adoption of the rule is authorized by *Minnesota Statutes*, section 14.06 (1990), which permits the agency to adopt rules regarding all formal or informal procedures relating to the administration of official agency duties.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

(Notice of Solicitation of Outside Information or Opinions)
Department of Administration, Materials Management Division

Notice of Solicitation of Outside Information or Opinions Regarding Proposed Rule Governing State Contracts.

Notice is hereby given that the State Department of Administration is seeking information or opinions from sources outside the Department in preparing to propose the amendment of the rule governing State contracts Chapter 1230. parts .0100 through .1300, and the permanent adoption of the emergency rule currently in effect governing the Small Business Procurement Program parts .1400 through .1910 the adoption of the rule is authorized by Minnesota statutues, section 16B.04, which permits the Department to adopt, amend, and rescind rules relating to any purpose, responsibility, or authorization in (that) Chapter (16B), specifically, "contracts and purchases" and "special purchasing situations" such as "designation of procurements from small businesses".

The State Department of Administration requests information and opinions concerning the subject matter of the rule, Chapter 1230.0100 through .1910. Interested groups may submit data or views on the subject matter of concern in writing or orally. Written statements should be addressed to:

Robert J. Baldwin
Department of Administration
Materials Management Division
Administration Building, Room #112
50 Sherburne Avenue
St. Paul, Minnesota 55155

Oral statements will be received during regular business hours, 8:00 A.M. to 4:30 P.M., Monday through Friday over the telephone at (612) 296-2600 and in person at the above address.

All statements of information and opinions shall be accepted until February 15, 1991. Any written material received by the State Department of Administration, Materials Management Division shall become part of the rulemaking record to be submitted to the Attorney General or Administrative Law Judge in the event that the rule is amended and adopted.

January 18, 1991

Terry L. Bock

Acting Commissioner of Administration

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Rule of the State Department of Administration Governing the Procurement of Materials and Services for the State and the Small Business Procurement Program

Affidavit on Petition for Adoption, Suspension Amendment or Repeal of the Rule

State of Minnesota)
) ss.
County of Ramsey)

Robert J. Baldwin, being sworn says:

I hereby certify that no petitions for adoption, suspension amendments or repeal of the rule were received by the Department. The need for revising the rule stems from changes and authorization to do so by new legislation; and the general authority of the Commissioner to adopt rules as specified in Minnesota Statutes § 16B.04, 16B.18, 16B.19 and 16B.22.

Robert J. Baldwin
(Name)

MANAGEMENT ANALYST
(Title)

Subscribed and sworn to before me

this 25 day of June, 1991.

Joyce Dehn

JOYCE DEHN
NOTARY PUBLIC—MINNESOTA
DAKOTA COUNTY
My Comm. Expires May 22, 1993

DEPARTMENT OF ADMINISTRATION

PROPOSED PERMANENT RULES RELATING TO STATE CONTRACTS AND THE SMALL BUSINESS PROCUREMENT PROGRAM

NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING

(1) Notice is hereby given that the Department of Administration intends to adopt the above-entitled rule without a public hearing. The Administrative Procedure Act, Minnesota Statutes, Sections 14.22 to 14.28 sets forth procedures for adopting rules without a public hearing; the statutory authority to adopt the rule is contained in Minnesota Statutes § 16B.04, 16B.18, 16B.19 and 16B.22. The proposed rule consists of the existing permanent rule, 1230.0100 through 1230.1300 "State Contracts" with deletions, changes and additions as shown in the following section under "Rules as Proposed" and the adoption of the existing emergency rule governing the "Small Business Procurement Program" 1230.1400 through 1230.1410 with minor changes, deletions and reorganization as shown.

(2) All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment in writing should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30 calendar day comment period beginning with the date of

publication of this notice. If 25 or more persons submit a written request for a public hearing within the 30 day comment period a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing must state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request and any change proposed. If a public hearing is required the department will proceed in accordance with Minnesota Statutes, Sections 14.13 to 14.20.

Comments and/or written requests for a public hearing must be submitted to:

ROBERT J. BALDWIN
MINNESOTA DEPARTMENT OF ADMINISTRATION
MATERIALS MANAGEMENT DIVISION, RM #112
50 SHERBURNE AVENUE
ST. PAUL, MINNESOTA 55155

The proposed rule may be modified if the modifications are supported by data and views submitted to the department and do not result in a substantial change in the proposed rule as shown in this notice. A copy of the proposed rule is attached to this notice.

A statement of need and reasonableness that describes the need for and reasonableness of the proposed rule is available upon request from Robert J. Baldwin at the above address.

(9) If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the attorney general for review as to legality and form to the extent that 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 adopted rule, must submit the written request to Robert J. Baldwin at the above address.

March 15, 1991
Dated

Dana Badgerow
Commissioner of Administration

DEPARTMENT OF ADMINISTRATION

PROPOSED PERMANENT RULES RELATING TO STATE CONTRACTS AND THE SMALL BUSINESS PROCUREMENT PROGRAM

AMENDMENT TO NOTICE OF INTENT TO ADOPT A RULE WITHOUT A PUBLIC HEARING

The above notice of intent to adopt a rule without a public hearing, dated March 15, 1991, is hereby amended to incorporate the following paragraph:

These proposed rules will impact small businesses which make applications to participate, and which do participate, in the MN Small Business Procurement Program. This program is directed at certain categories of small businesses, and allows those eligible small businesses preferential treatment in the state purchasing process. To enjoy the benefits of this program, the small business must submit certain financial and other information in order for the Department to determine if the small business is eligible for the program. All information required is normally in the hands of the business owner, therefore the impact and regulations are reasonable. Further information regarding the impact on small business is available in the Statement of Need and Reasonableness.

Dana B. Badgerow
Commissioner of Administration

3-29-91
Date

Office of the Revisor of Statutes

Administrative Rules

TITLE: Proposed Permanent Rules Relating to Business

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 of Administration

Proposed Permanent Rules Relating to Business

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.

1230.0150 DEFINITIONS.

Subpart 1. **Scope.** Within parts 1230.0100 to 1230.1910, the following apply, unless clearly indicated otherwise by the context.

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. 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 contractor, subcontractor, supplier, consultant, or provider of technical, administrative, or physical services organized as a sole proprietorship, partnership, association, corporation, or other entity formed for the purpose of doing business for profit.

Subp. 5. **Contractor.** "Contractor" means a business that

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is engaged in construction such as general, mechanical, 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 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 a contract by a governmental body, for a specified 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 Materials Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means an operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, that does not provide the operator with the exclusive right to profit from the operator's 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. **Joint venture.** "Joint venture" means the temporary association of two or more businesses to secure and fulfill a procurement bid award. For awards under the preference or set-aside provisions of the small business procurement program in parts 1230.1400 to 1230.1910, all parties in the joint venture must be certified as targeted groups or

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economically disadvantaged area businesses.

Subp. 12. **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. 13. **Manufacturer.** "Manufacturer" means a business that makes or processes raw materials into a finished product.

Subp. 14. **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. 15. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions that allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 16. **Open market.** "Open market" means purchases made in the marketplace without the need for competitive bids.

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

Subp. 18. **Principal place of business.** "Principal place of business" means the primary 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 on which debarment ends by submitting an application to the director. If a debarred vendor is restored to the state bidders lists, the vendor will be subject to a one-year probationary period.

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

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

B. if services are to be provided, has the necessary

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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 a contract as evidenced by the ability to obtain bonding when required; and

D. has no unresolved 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, or operated under false names or fronts as a small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota, as evidenced by timely filing of all required returns, reports, payments, and possession of all applicable stamps, licenses, or other permits, and freedom from any judgment, lien, or seizure of assets or property to satisfy tax payments or duties; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G within 30 days or less or within a reasonable amount of time determined by prior consensus between the bidder and the division.

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

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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 exceed six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means 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.** The terms in items A to C have the meanings given them for purposes of administering the small business procurement program.

A. "Racial minority" means persons in one or more of the categories in subitems (1) to (5).

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

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

(5) "Indian" means persons having origins in any of the original peoples of North America who are enrolled members of Indian tribes recognized by the governments of the United States and Canada.

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

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C. "Persons who have suffered a substantial physical disability" means 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 the person's 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 an individual, partnership, corporation, joint venture, association, or cooperative that is 51 percent owned and is operationally controlled on a day-to-day basis by citizens of the United States.

1230.0300 SOLICITING BIDS.

Subpart 1. **Publication.** Any purchase estimated to exceed ~~$15,000~~ the limits established by Minnesota Statutes, section 16B.07, subdivision 3, shall be purchased on sealed bids, notice of solicitation of bid ~~to be inserted once in a newspaper of general circulation~~ will be advertised at least seven days prior to the bid opening date. Bids shall also be solicited by sending bid invitations to ~~all~~ prospective bidders registered with the division ~~of Procurement~~ pursuant to subpart 3 ~~and by posting notice on a public bulletin board in the Division of Procurement Office at least five days prior to the bid opening date~~.

Subp. 2. **Open market.** Any purchase estimated to be ~~$15,000 or~~ less than the limits established by Minnesota Statutes, section 16B.07, subdivision 4, may be made upon competitive bids or in the open market~~, but in either case will be based on three competitive bids, so far as practicable~~.

Subp. 3. **List of bidders.** A list of bidders shall be

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maintained by the division ~~of Procurement~~ for various ~~commodity classes~~ commodities and services. ~~Any~~ Persons desiring to sell ~~supplies~~ commodities or provide services to the state may ~~file with the director of procurement a letter showing their business address, the commodities they desire to sell to the state, and proof of incorporation or registration to do business in the state~~ request a vendor registration application. Upon approval of the application by the division as meeting the requirements in part 1230.0150, subpart 20, the ~~firm~~ vendor's name shall ~~then~~ be placed on ~~the permanent~~ appropriate bid ~~list~~ lists to receive invitations to bid. The name of a ~~bidder~~ vendor who fails to respond to three consecutive bid invitations ~~shall~~ will be removed from the ~~list~~ lists of bidders ~~upon written notice~~. The name of the ~~bidder~~ vendor so removed ~~shall~~ will be restored only ~~by~~ through specific written request from the vendor.

1230.0400 SUBMISSION OF ADVERTISED BIDS.

Subpart 1. [See repealer.]

Subp. 2. **Bid conditions.** General bid conditions applicable to all state purchases shall be stated on the standard invitation to bid. Special bid conditions applicable to specific commodities or types of purchase shall be stated in the invitation to bid. ~~Special conditions supersede general conditions, if conflicting~~ In the event of conflict between general bid conditions and special bid conditions, the special bid conditions will govern.

Subp. 3. [See repealer.]

1230.0500 BID SECURITY.

Subpart 1. **Payment.** Each bid invitation shall set forth the bid security required by the division. Such bid security shall be made payable to "State of Minnesota" and shall be made upon the condition or guarantee that in the event the bidder's offer is accepted, the bidder shall enter into contract in accordance with the proposal.

Subp. 2. **Forfeit.** Certified checks or bid bonds of

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successful bidders shall constitute liquidated damages for failure of a bidder to enter into a contract, and shall also be held as security for delivery and acceptance of merchandise, or satisfactory completion of the contract. A performance bond for 25 percent of the award may be substituted.

Subp. 3. **Return.** Bid security checks of unsuccessful bidders shall be returned to vendor by placing them in the mail within five working days after an award is made. Bid security checks of successful vendors shall be returned as soon as delivery is completed and acceptance is made by the agency, or the contract is satisfactorily completed. No interest shall be paid on any ~~moneys~~ money held as security.

Subp. 4. **Annual bid and supply bond.** Bidders may file with the director ~~of procurement~~ an annual bid and supply bond in lieu of individual bonds or other security required in various individual bid invitations. Annual bid and supply bonds, when accepted by the director ~~of procurement~~, shall cover all bids by the vendor for materials, commodities, and supplies during the effective period of the annual bond, except as provided in subpart 5. The vendor shall be notified in writing if the necessity arises to attach the bond for breach of contract.

Subp. 5. **Bids excluded from annual bid and supply bonds.** Annual bid and supply bonds shall not cover ~~bid~~ bids:

A. for building construction, repair, remodeling, or other public works;

B. on which the annual bid security does not amount to five percent of the bid;

C. when another bond is required by specification; or

D. when bond is used as security on other bids.

1230.0600 BIDDER ERRORS.

Prior to the opening of sealed bids, any person may withdraw ~~his~~ a bid by notifying the director in writing of ~~his~~ the desire to withdraw, by appearing in person at the division ~~of Procurement~~ office and withdrawing the bid, or by

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telegraphic writing or facsimile received by the director requesting withdrawal of ~~his~~ the bid.

Subsequent to the opening of sealed bids, a person may withdraw ~~his~~ a bid only upon a showing that an obvious error exists in the bid. The showing and request for withdrawal must be made in writing to the director within a reasonable time after the opening of the bids and prior to the state's detrimental reliance on the bid.

1230.0700 OPENING OF BIDS.

Subpart 1. **Division's treatment of bids.** Upon receipt in the division ~~of Procurement~~, all bids will be time stamped, showing the date and hour received. Bids received after the time set for the opening of bids will be returned unopened to the bidders. Bids shall be opened publicly and read aloud at the time and place established in the bid invitation. ~~All original bids will be retained pursuant to Minnesota Statutes, section 16B.07, subdivision 3, for public inspection in the Division of Procurement.~~

Subp. 2. [See repealer.]

Subp. 3. **Rejection of bids.** The state may reject any or all bids or portions thereof. All bids shall be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, or insufficient state funds. A vendor whose sealed bid is rejected shall be given notice of the rejection and the reason(s) for rejection of the bid.

Subp. 4. **Informalities and minor deficiencies.** The state reserves the right to waive minor deficiencies or informalities in bids. Minor informalities shall be waived if, in the judgment of the director ~~of procurement~~, the best interest of the state would be served without prejudice to the rights of the other bidders. Examples of minor deficiencies include, but are not limited to, omission of the title of the signatory; failure to furnish required catalog cuts; and minor detail omissions.

1230.0900 TIED BIDS.

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Subpart 1. **Resolving tied bids.** Tied low bids for less than $500 shall be resolved by drawing lots among the tied low bidders, except as provided in subpart 2.

Except as provided in subpart 2, tied low bids for $500 or more shall be referred to the director ~~or assistant director of procurement~~ for disposition. The director ~~of procurement~~ may enter into negotiation with tied low bidders when the director deems such action to be in the best interest of the state.

Subp. 2. **Preference for Minnesota firms.** Whenever a tie involves a Minnesota firm and one whose place of business is outside the state of Minnesota, preference shall be given to the Minnesota firm.

1230.1000 CONTRACT PERFORMANCE.

Subpart 1. **Shipment.** The director ~~of procurement~~ or authorized agents of state departments shall place orders with successful bidders using official state purchase orders. Upon award, shipment shall be made in accordance with delivery instructions in the invitation to bid.

Subp. 2. **Inspection.** The state may require that the vendor permit inspection of the commodities prior to shipment at the factory, plant, or establishment where produced, manufactured, or stored. Unless provision for inspection is made in the invitation to bid, costs thereby incurred will be paid by the state.

Subp. 3. **Grounds for rejection.** All deliveries shall conform to specifications of the bid. Failure in this respect shall be cause for rejection of the goods. Commodities that fail to comply with specifications, fail to conform to the vendor's sample, are not as provided on the purchase order, or arrive in an unsatisfactory condition shall be rejected except as provided in subpart 7.

Subp. 4. **Notice of rejection.** Notice of rejection, based upon apparent deficiencies disclosed by ordinary methods of inspection, shall be given by the receiving agency to both vendor and the carrier (if f.o.b. shipping point) within

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reasonable time after delivery, with a copy of this notice to the division ~~of Procurement~~. A revocation of acceptance for latent deficiencies that would make the items unsatisfactory for the purpose intended shall be given by the state within reasonable time after discovery. The contractor shall satisfactorily repair or replace such items within a reasonable ~~period of~~ time.

Subp. 5. **Removal of rejected items.** The vendor shall ~~forthwith~~ remove at ~~his~~ the vendor's expense any item rejected by the state. If the vendor fails to remove ~~such an item, or to forthwith forward~~ the items and instead forwards shipping instructions to the agency concerned, the state need not comply, but may sell the item and remit the proceeds of sale, less the expense involved, in accordance with law, including but not limited to, Minnesota Statutes, section 336.2-603.

Subp. 6. **Replacing rejected items.** If the needs of a state agency do not permit time to replace rejected merchandise, or if deliveries are not made within the time specified in the contract, the agency may, with the approval of the director ~~of procurement~~, buy on the open market supplies of the nature required. The vendor shall be liable for all additional costs and expenses.

Subp. 7. **Adjusting price of nonconforming items.** If it is determined that an item does not conform strictly to specifications, but can be used satisfactorily, the director ~~of procurement may adjust the price,~~ with written acquiescence of the vendor, may adjust the price and authorize the agency to keep and use such part of the order when such action is required to sustain continued operation.

Subp. 8. **Laboratory tests.** The director ~~of procurement~~ may ~~direct~~ require that a laboratory analysis or other tests be made to determine the acceptability of the delivered product(s) and to ensure that those product(s) meet specifications. ~~In these instances~~ When analyses or tests are required, acceptance by the state shall not occur nor be deemed to have been made, ~~and the discount time shall not begin,~~ until testing is

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completed and affirmative results are obtained. Any discount time applicable shall begin after affirmative results are obtained. Vendors shall be notified of unsatisfactory test results.

1230.1100 FAILURE TO PERFORM.

Subpart 1. **Penalties.** If a bidder who is awarded a contract fails to perform as specified, the bid security as described in part 1230.0500, subpart 1, shall be retained by the state and deposited with the state treasurer as liquidated damages. The vendor may also be determined not to be a responsible bidder. The state may also pursue all other remedies permitted by rule or provided by law.

If the bid security is in the form of a bond, the bonding company shall be notified in writing of the default. A vendor who fails to enter into contract that has been awarded to him may be determined not to be a responsible bidder regardless of whether bid security was required. The state may seek further damages and shall not be limited by the absence or existence of a bond. In all cases of default, the vendor may be determined not to be a responsible bidder.

Subp. 2. **Failure to furnish security.** After the award of a contract, if performance security is required and the vendor fails to furnish satisfactory performance security, ~~if required,~~ the vendor shall be **deemed** considered in default and subject to ~~the above provisions~~ subpart 1 and this subpart.

Subp. 3. **Types of failure to conform to specifications.** A vendor shall be held in default for failure to conform to bid specifications or standard commercial practices including, but not limited to the following:

A. failure to make deliveries within the time specified in the contract; or

B. deliveries of goods or materials that do not conform to samples or specifications ~~and are not promptly replaced~~; or

C. delivery of goods or materials that are ~~repeatedly~~

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rejected; or

D. misbranding or materially misrepresenting goods or materials purchased under the contract.

1230.1150 AUTHORITY TO DEBAR OR SUSPEND VENDORS.

Subpart 1. **Suspension.** After written notice to the person involved and providing for a reasonable opportunity for that person to be heard, the director shall have the authority to suspend a person from consideration for awards of contracts for a minimum of one year if the director determines that the person has engaged in an activity that might lead to debarment.

Subp. 2. **Debarment causes.** A vendor shall be debarred if one or more of the following occurs:

A. conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

B. conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor;

C. conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation of contract provisions, as set forth in subitems (1) and (2), of a character that is regarded by the director to be so serious as to justify debarment action:

(1) failure without good cause to perform according to the specifications or within the time limit provided in the contract; or

(2) a recent record of failure to perform, or of unsatisfactory performance, according to the terms of one or more contracts; provided that this failure to perform or unsatisfactory performance was not caused by acts beyond the control of the contractor; or

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E. any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including, but not limited to, collusion with other bidders to restrain competitive bidding, giving false information on a bidder's application, and all acts that would disqualify the person as a responsible bidder, as defined in part 1230.0150, subpart 20, including debarment by another governmental entity.

In the case of debarment by other governmental entities, should that debarment result from action by the federal government, the state of Minnesota, or any of its departments, commissions, or agencies, or any of its political subdivisions, the terms and limits of that debarment are automatically effective for parties so debarred in doing business with the division. Debarments by other governmental entities are cause for suspension until a determination can be made by the division under normal suspension procedures as to whether the debarment applies under Minnesota statutes and rules.

Subp. 3. **Written notice.** A written notice to debar or suspend shall be furnished to the affected parties and shall:

A. state the reasons for the action taken;

B. give the length of time the vendor will be debarred; and

C. inform the debarred or suspended person of the person's rights to administrative and judicial review according to subpart 4.

Subp. 4. **Suspension or debarment appeals.** If suspended or debarred, a person may file an appeal in writing with the commissioner of administration within 30 days of receipt of a decision to suspend or debar. The commissioner shall, within 45 days, decide whether the actions taken were according to statutes and regulations and were fair and in the best interest of the state.

Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

Subp. 5. **Length of debarment.** A bidder may be debarred

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from receiving and submitting bids for not less than one year, nor more than three years. The length of the debarment will depend on the vendor's past performance, the number and seriousness of the current complaints, and the cost to the state associated with correcting the problem.

Subp. 6. **Public list of debarred.** The division shall maintain a master list of all suspensions and debarments. The master list will retain all information concerning suspensions and debarments as a public record. The records will be maintained for at least three years following the end of a suspension or debarment. Such public information may be considered in responsible bidder determinations according to part 1230.0150, subpart 20.

1230.1175 REINSTATEMENT AND PROBATION.

Subpart 1. **Review of reinstatement applications.** The director will review vendor applications for reinstatement.

Subp. 2. **Application for reinstatement time limits.** A person who has been debarred may not seek reinstatement until one year from the end of the debarment period.

Subp. 3. **Information in reinstatement application.** A request for reinstatement must be made to the director in writing and include:

A. all information necessary to qualify as a responsible bidder, as defined in part 1230.0150, subpart 20;

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

C. 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

D. a written narrative outlining all steps taken to ensure that the cause for debarment has been corrected with appropriate supporting documentation.

Subp. 4. **Actions following decision.** The director will

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determine if the person can be reinstated as a responsible bidder and be added to the bidders list. If, after investigation, the petitioner's request for reinstatement is denied, the person cannot reapply for reinstatement for one year from the date of denial. If reinstated, the petitioner will be placed on the bidders list and be subject to a one-year probationary period.

Subp. 5. **Probationary periods and conditions.** Vendor probationary periods apply to formally debarred persons who have been reinstated as responsible bidders.

The length of the probationary period will be one year from the date of reinstatement.

During the probationary period, the party on probation must respond to all bid requests received from the division.

If a bid from a vendor on probation is accepted and the vendor refuses to perform or enters into a contract and performance is substandard, the performance or supply bond, if any, will be retained and the vendor will be deemed not to be a responsible bidder and will be permanently removed from the list of bidders.

1230.1200 CONTRACT CANCELLATION.

The director ~~of procurement~~ may cancel a purchase entered into under competitive bidding under any one of the following conditions including, but not limited to:

A. the contractor agrees to the cancellation;

B. the contractor has obtained the contract by fraud, collusion, conspiracy, or in conflict with any statutory or constitutional provision of the state of Minnesota; ~~or~~

C. failure to deliver as agreed; or

D. failure to deliver within the time period stated in the invitation to bid.

~~SMALL BUSINESSES OWNED BY DISADVANTAGED PERSONS~~

BUSINESS PROCUREMENT PROGRAM

1230.1400 PURPOSE.

Parts ~~1230.1300~~ 1230.1400 to ~~1230.1900~~ 1230.1910 are

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~~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.~~

1230.1450 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern. The definitions contained in part 1230.0150 shall apply in the administration of these preference programs.

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

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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

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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 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

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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:

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(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

~~6.--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

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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,

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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

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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

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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

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(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~~

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~~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

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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 and expertise 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

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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

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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

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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

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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~~

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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 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.

1230.1805 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

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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 will depend 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

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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

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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

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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 director or the director's designee. The director may uphold, modify, or reject the penalty. The decision of the director 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 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.

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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 as specified in parts 1230.1000 and 1230.1100.

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 according to part 1230.1175.

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

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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 certified directory under subpart 3, 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 certified directory was reasonable and whether the removal is in compliance with subpart 3. 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 to the 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

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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

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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

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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 parts 1230.1000 and 1230.1100. The records of the division

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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~~ 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 division, before or after the annual reporting requirement date.

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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 1230.0150, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. Minnesota Rules, parts 1230.0200; 1230.0400, subparts 1 and 3; 1230.0700, subpart 2; 1230.1500; 1230.1700, subparts 2 and 3; 1230.1800; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300, are repealed.

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STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of the Rule of the State Department of Administration Governing the Procurement of Materials and Services for the State and the Small Business Procurement Program.

Affidavit of Mailing the Notice of Intent to Adopt a Rule Without a Public Hearing & Certification of Mailing List

State of Minnesota)
)ss.
County of Ramsey)

Dorothy Lovejoy, being sworn says:

I hereby certify that the list of persons and associations who have requested, pursuant to Minnesota Statutes, sections 14.14, subdivision 1a and 14.22 or 14.30, that their names be placed on the State Department of Administration rulemaking mailing list is accurate, complete, and current as of this 1st day of April, 1991.

Dorothy J. Lovejoy
(Name)

Manager, Customer + Vendor Svcs.
(Title)

Subscribed and sworn to before me this 12th day of June, 1991.

Deloris D. Askew

DELORIS S. ASKEW
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Comm. Expires April 4, 1996

- -

Kathy Racine, being sworn says:

That on the 1st day of April, 1991 at the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached notice of intent to adopt a rule without a public hearing by depositing in the State of Minnesota central system for United States mailing, a copy thereof, with postage prepaid, to all persons and associations on the aforementioned mailing list, and further that on April 4, 1991 at the City of St. Paul, County of Ramsey, State of Minnesota, I mailed the attached amendment and notice extending the public comment period by seven days to all persons and associations receiving the prior mailing and that such mailing was accomplished by depositing a copy of the amendment for each person or association so involved in the State of Minnesota central mail system for United States mailing such copy being postage prepaid.

Kathy Racine
(Name)

Subscribed and sworn to before me Clerk Typist III
(Title)

This 12th Day of June 1991.

Deloris D. Askew

DELORIS S. ASKEW
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Comm. Expires April 4, 1996

Proposed Rules

Pursuant to Minn. Stat. §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Administration

Proposed Permanent Rules Relating to Business

Notice of Intent to Adopt a Rule Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Department of Administration intends to adopt the above-entitled rule without a public hearing. The Administrative Procedure Act, *Minnesota Statutes*, Sections 14.22 to 14.28 sets forth procedures for adopting rules without a public hearing; the statutory authority to adopt the rule is contained in *Minnesota Statutes* § 16B.04, 16B.18, 16B.19 and 16B.22. The proposed rule consists of the existing permanent rule, 1230.0100 through 1230.1300 "State Contracts" with deletions, changes and additions as shown in the following section under "Rules as Proposed" and the adoption of the existing emergency rule governing the "Small Business Procurement Program" 1230.1400 through 1230.1410 with minor changes, deletions and reorganization as shown.

All persons have 30 days in which to submit comment in support of or in opposition to the proposed rule or any part or subpart of the rule. Comment is encouraged. Each comment in writing should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

Any person may make a written request for a public hearing on the rule within the 30 calendar day comment period beginning with the date of publication of this notice. If 25 or more persons submit a written request for a public hearing within the 30 day comment period a public hearing will be held unless a sufficient number withdraw their request in writing. Any person requesting a public hearing must state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request and any change proposed. If a public hearing is required the department will proceed in accordance with *Minnesota Statutes*, Sections 14.13 to 14.20.

Comments and/or written requests for a public hearing must be submitted to:

Robert J. Baldwin
Minnesota Department of Administration
Materials Management Division, Rm. #112
50 Sherburne Avenue
St. Paul, Minnesota 55155

The proposed rule may be modified if the modifications are supported by data and views submitted to the department and do not result in a substantial change in the proposed rule as shown in this notice. A copy of the proposed rule is attached to this notice.

A STATEMENT OF NEED AND REASONABLENESS that describes the need for and reasonableness of the proposed rule is available upon request from Robert J. Baldwin at the above address.

If no hearing is required, upon adoption of the rule, the rule and the required supporting documents will be submitted to the attorney general for review as to legality and form to the extent that 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 adopted rule, must submit the written request to Robert J. Baldwin at the above address.

Dated: 15 March 1991

Dana Badgerow
Commissioner of Administration

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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.

1230.0150 DEFINITIONS.

Subpart 1. **Scope.** Within parts 1230.0100 to 1230.1910, the following apply, unless clearly indicated otherwise by the context.

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. 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 contractor, subcontractor, supplier, consultant, or provider of technical, administrative, or physical services organized as a sole proprietorship, partnership, association, corporation, or other entity formed for the purpose of doing business for profit.

Subp. 5. **Contractor.** "Contractor" means a business that is engaged in construction such as general, mechanical, 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 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 a contract by a governmental body, for a specified 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 Materials Management Division, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

Subp. 10. **Franchise.** "Franchise" means an operating agreement obtained from a franchiser to conduct a business entity, as an affiliate, that does not provide the operator with the exclusive right to profit from the operator's 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. **Joint venture.** "Joint venture" means the temporary association of two or more businesses to secure and fulfill a procurement bid award. For awards under the preference or set-aside provisions of the small business procurement program in parts 1230.1400 to 1230.1910, all parties in the joint venture must be certified as targeted groups or economically disadvantaged area businesses.

Subp. 12. **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. 13. **Manufacturer.** "Manufacturer" means a business that makes or processes raw materials into a finished product.

Subp. 14. **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. 15. **Material variance.** "Material variance" means a variance in a bid from specifications or conditions that allows a bidder a substantial advantage or benefit not enjoyed by all other bidders.

Subp. 16. **Open market.** "Open market" means purchases made in the marketplace without the need for competitive bids.

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

Subp. 18. **Principal place of business.** "Principal place of business" means the primary 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 on which debarment ends by submitting an application to the director. If a debarred vendor is restored to the state bidders lists, the vendor will be subject to a one-year probationary period.

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

A. is a manufacturer of, deals in, but is not a broker of, or is 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 a contract as evidenced by the ability to obtain bonding when required; and

D. has no unresolved 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, or operated under false names or fronts as a small business or a socially or economically disadvantaged small business; and

G. is in compliance with all tax laws of Minnesota, as evidenced by timely filing of all required returns, reports, payments, and possession of all applicable stamps, licenses, or other permits, and freedom from any judgment, lien, or seizure of assets or property to satisfy tax payments or duties; and

H. is willing to furnish all information necessary to determine responsibility as outlined in items A to G within 30 days or less or within a reasonable amount of time determined by prior consensus between the bidder and the division.

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 exceed six months.

Subp. 23. **Targeted group businesses.** "Targeted group businesses" means 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.** The terms in items A to C have the meanings given them for purposes of administering the small business procurement program.

A. "Racial minority" means persons in one or more of the categories in subitems (1) to (5).

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

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

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(5) "Indian" means persons having origins in any of the original peoples of North America who are enrolled members of Indian tribes recognized by the governments of the United States and Canada.

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

C. "Persons who have suffered a substantial physical disability" means 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 the person's 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 an individual, partnership, corporation, joint venture, association, or cooperative that is 51 percent owned and is operationally controlled on a day-to-day basis by citizens of the United States.

1230.0300 SOLICITING BIDS.

Subpart 1. **Publication.** Any purchase estimated to exceed ~~$15,000~~ the limits established by *Minnesota Statutes*, section 16B.07, subdivision 3, shall be purchased on sealed bids, notice of solicitation of bid ~~to be inserted once in a newspaper of general circulation~~ will be advertised at least seven days prior to the bid opening date. Bids shall also be solicited by sending bid invitations to ~~all~~ prospective bidders registered with the division ~~of Procurement~~ pursuant to subpart 3 ~~and by posting notice on a public bulletin board in the Division of Procurement Office at least five days prior to the bid opening date~~.

Subp. 2. **Open market.** Any purchase estimated to be ~~$15,000 or~~ less than the limits established by *Minnesota Statutes*, section 16B.07, subdivision 4, may be made upon competitive bids or in the open market~~, but in either case will be based on three competitive bids, so far as practicable~~.

Subp. 3. **List of bidders.** A list of bidders shall be maintained by the division ~~of Procurement~~ for various ~~commodity classes~~ commodities and services. ~~Any~~ Persons desiring to sell ~~supplies~~ commodities or provide services to the state may ~~file with the director of procurement a letter showing their business address, the commodities they desire to sell to the state, and proof of incorporation or registration to do business in the state~~ request a vendor registration application. Upon approval of the application by the division as meeting the requirements in part 1230.0150, subpart 20, the ~~firm~~ vendor's name shall ~~then~~ be placed on ~~the permanent~~ appropriate bid ~~list~~ lists to receive invitations to bid. The name of a ~~bidder~~ vendor who fails to respond to three consecutive bid invitations ~~shall~~ will be removed from the ~~list~~ lists of bidders ~~upon written notice~~. The name of the ~~bidder~~ vendor so removed ~~shall~~ will be restored only ~~by~~ through specific written request from the vendor.

1230.0400 SUBMISSION OF ADVERTISED BIDS.

Subpart 1. [See repealer.]

Subp. 2. **Bid conditions.** General bid conditions applicable to all state purchases shall be stated on the standard invitation to bid. Special bid conditions applicable to specific commodities or types of purchase shall be stated in the invitation to bid. ~~Special conditions supersede general conditions, if conflicting~~ In the event of conflict between general bid conditions and special bid conditions, the special bid conditions will govern.

Subp. 3. [See repealer.]

1230.0500 BID SECURITY.

Subpart 1. **Payment.** Each bid invitation shall set forth the bid security required by the division. Such bid security shall be made payable to "State of Minnesota" and shall be made upon the condition or guarantee that in the event the bidder's offer is accepted, the bidder shall enter into contract in accordance with the proposal.

Subp. 2. **Forfeit.** Certified checks or bid bonds of successful bidders shall constitute liquidated damages for failure of a bidder to enter into a contract, and shall also be held as security for delivery and acceptance of merchandise, or satisfactory completion of the contract. A performance bond for 25 percent of the award may be substituted.

Subp. 3. **Return.** Bid security checks of unsuccessful bidders shall be returned to vendor by placing them in the mail within five working days after an award is made. Bid security checks of successful vendors shall be returned as soon as delivery is completed and acceptance is made by the agency, or the contract is satisfactorily completed. No interest shall be paid on any ~~moneys~~ money held as security.

Subp. 4. **Annual bid and supply bond.** Bidders may file with the director ~~of procurement~~ an annual bid and supply bond in lieu of individual bonds or other security required in various individual bid invitations. Annual bid and supply bonds, when accepted by the director ~~of procurement~~, shall cover all bids by the vendor for materials, commodities, and supplies during the effective period of the annual bond, except as provided in subpart 5. The vendor shall be notified in writing if the necessity arises to attach the bond for breach of contract.

Subp. 5. **Bids excluded from annual bid and supply bonds.** Annual bid and supply bonds shall not cover ~~bid~~ bids:

A. for building construction, repair, remodeling, or other public works;

B. on which the annual bid security does not amount to five percent of the bid;

C. when another bond is required by specification; or

D. when bond is used as security on other bids.

1230.0600 BIDDER ERRORS.

Prior to the opening of sealed bids, any person may withdraw ~~his~~ a bid by notifying the director in writing of ~~his~~ the desire to withdraw, by appearing in person at the division ~~of Procurement~~ office and withdrawing the bid, or by telegraphic writing or facsimile received by the director requesting withdrawal of ~~his~~ the bid.

Subsequent to the opening of sealed bids, a person may withdraw ~~his~~ a bid only upon a showing that an obvious error exists in the bid. The showing and request for withdrawal must be made in writing to the director within a reasonable time after the opening of the bids and prior to the state's detrimental reliance on the bid.

1230.0700 OPENING OF BIDS.

Subpart 1. **Division's treatment of bids.** Upon receipt in the division ~~of Procurement~~, all bids will be time stamped, showing the date and hour received. Bids received after the time set for the opening of bids will be returned unopened to the bidders. Bids shall be opened publicly and read aloud at the time and place established in the bid invitation. ~~All original bids will be retained pursuant to *Minnesota Statutes*, section 16B.07, subdivision 3, for public inspection in the Division of Procurement.~~

Subp. 2. [See repealer.]

Subp. 3. **Rejection of bids.** The state may reject any or all bids or portions thereof. All bids shall be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, or insufficient state funds. A vendor whose sealed bid is rejected shall be given notice of the rejection and the reason(s) for rejection of the bid.

Subp. 4. **Informalities and minor deficiencies.** The state reserves the right to waive minor deficiencies or informalities in bids. Minor informalities shall be waived if, in the judgment of the director ~~of procurement~~, the best interest of the state would be served without prejudice to the rights of the other bidders. Examples of minor deficiencies include, but are not limited to, omission of the title of the signatory; failure to furnish required catalog cuts; and minor detail omissions.

1230.0900 TIED BIDS.

Subpart 1. **Resolving tied bids.** Tied low bids for less than $500 shall be resolved by drawing lots among the tied low bidders, except as provided in subpart 2.

Except as provided in subpart 2, tied low bids for $500 or more shall be referred to the director ~~or assistant director of procurement~~ for disposition. The director ~~of procurement~~ may enter into negotiation with tied low bidders when the director deems such action to be in the best interest of the state.

Subp. 2. **Preference for Minnesota firms.** Whenever a tie involves a Minnesota firm and one whose place of business is outside the state of Minnesota, preference shall be given to the Minnesota firm.

1230.1000 CONTRACT PERFORMANCE.

Subpart 1. **Shipment.** The director ~~of procurement~~ or authorized agents of state departments shall place orders with successful bidders using official state purchase orders. Upon award, shipment shall be made in accordance with delivery instructions in the invitation to bid.

Subp. 2. **Inspection.** The state may require that the vendor permit inspection of the commodities prior to shipment at the factory, plant, or establishment where produced, manufactured, or stored. Unless provision for inspection is made in the invitation to bid, costs thereby incurred will be paid by the state.

Subp. 3. **Grounds for rejection.** All deliveries shall conform to specifications of the bid. Failure in this respect shall be cause for rejection of the goods. Commodities that fail to comply with specifications, fail to conform to the vendor's sample, are not as provided on the purchase order, or arrive in an unsatisfactory condition shall be rejected except as provided in subpart 7.

Subp. 4. **Notice of rejection.** Notice of rejection, based upon apparent deficiencies disclosed by ordinary methods of inspection,

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shall be given by the receiving agency to both vendor and the carrier (if f.o.b. shipping point) within reasonable time after delivery, with a copy of this notice to the division ~~of Procurement~~. A revocation of acceptance for latent deficiencies that would make the items unsatisfactory for the purpose intended shall be given by the state within reasonable time after discovery. The contractor shall satisfactorily repair or replace such items within a reasonable ~~period of~~ time.

Subp. 5. **Removal of rejected items.** The vendor shall ~~forthwith~~ remove at ~~his~~ the vendor's expense any item rejected by the state. If the vendor fails to remove ~~such an item, or to forthwith forward~~ the items and instead forwards shipping instructions to the agency concerned, the state need not comply, but may sell the item and remit the proceeds of sale, less the expense involved, in accordance with law, including but not limited to, *Minnesota Statutes*, section 336.2-603.

Subp. 6. **Replacing rejected items.** If the needs of a state agency do not permit time to replace rejected merchandise, or if deliveries are not made within the time specified in the contract, the agency may, with the approval of the director ~~of procurement~~, buy on the open market supplies of the nature required. The vendor shall be liable for all additional costs and expenses.

Subp. 7. **Adjusting price of nonconforming items.** If it is determined that an item does not conform strictly to specifications, but can be used satisfactorily, the director ~~of procurement may adjust the price,~~ with written acquiescence of the vendor, may adjust the price and authorize the agency to keep and use such part of the order when such action is required to sustain continued operation.

Subp. 8. **Laboratory tests.** The director ~~of procurement~~ may ~~direct~~ require that a laboratory analysis or other tests be made to determine the acceptability of the delivered product(s) and to ensure that those product(s) meet specifications. ~~In these instances~~ When analyses or tests are required, acceptance by the state shall not occur nor be deemed to have been made~~, and the discount time shall not begin,~~ until testing is completed and affirmative results are obtained. Any discount time applicable shall begin after affirmative results are obtained. Vendors shall be notified of unsatisfactory test results.

1230.1100 FAILURE TO PERFORM.

Subpart 1. **Penalties.** If a bidder who is awarded a contract fails to perform as specified, the bid security as described in part 1230.0500, subpart 1, shall be retained by the state and deposited with the state treasurer as liquidated damages. The vendor may also be determined not to be a responsible bidder. The state may also pursue all other remedies permitted by rule or provided by law.

If the bid security is in the form of a bond, the bonding company shall be notified in writing of the default. A vendor who fails to enter into contract that has been awarded to him may be determined not to be a responsible bidder regardless of whether bid security was required. The state may seek further damages and shall not be limited by the absence or existence of a bond. In all cases of default, the vendor may be determined not to be a responsible bidder.

Subp. 2. **Failure to furnish security.** After the award of a contract, if performance security is required and the vendor fails to furnish satisfactory performance security, ~~if required,~~ the vendor shall be ~~deemed~~ considered in default and subject to ~~the above provisions~~ subpart 1 and this subpart.

Subp. 3. **Types of failure to conform to specifications.** A vendor shall be held in default for failure to conform to bid specifications or standard commercial practices including, but not limited to the following:

A. failure to make deliveries within the time specified in the contract; or

B. deliveries of goods or materials that do not conform to samples or specifications ~~and are not promptly replaced~~; or

C. delivery of goods or materials that are ~~repeatedly~~ rejected; or

D. misbranding or materially misrepresenting goods or materials purchased under the contract.

1230.1150 AUTHORITY TO DEBAR OR SUSPEND VENDORS.

Subpart 1. **Suspension.** After written notice to the person involved and providing for a reasonable opportunity for that person to be heard, the director shall have the authority to suspend a person from consideration for awards of contracts for a minimum of one year if the director determines that the person has engaged in an activity that might lead to debarment.

Subp. 2. **Debarment causes.** A vendor shall be debarred if one or more of the following occurs:

A. conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

B. conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or other offense indicating a lack of business integrity or business honesty that currently, seriously, and directly affects responsibility as a state contractor;

C. conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. violation of contract provisions, as set forth in subitems (1) and (2), of a character that is regarded by the director to be so serious as to justify debarment action:

(1) failure without good cause to perform according to the specifications or within the time limit provided in the contract;

or

(2) a recent record of failure to perform, or of unsatisfactory performance, according to the terms of one or more contracts; provided that this failure to perform or unsatisfactory performance was not caused by acts beyond the control of the contractor; or

E. any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including, but not limited to, collusion with other bidders to restrain competitive bidding, giving false information on a bidder's application, and all acts that would disqualify the person as a responsible bidder, as defined in part 1230.0150, subpart 20, including debarment by another governmental entity.

In the case of debarment by other governmental entities, should that debarment result from action by the federal government, the state of Minnesota, or any of its departments, commissions, or agencies, or any of its political subdivisions, the terms and limits of that debarment are automatically effective for parties so debarred in doing business with the division. Debarments by other governmental entities are cause for suspension until a determination can be made by the division under normal suspension procedures as to whether the debarment applies under *Minnesota statutes* and rules.

Subp. 3. **Written notice.** A written notice to debar or suspend shall be furnished to the affected parties and shall:

A. state the reasons for the action taken;

B. give the length of time the vendor will be debarred; and

C. inform the debarred or suspended person of the person's rights to administrative and judicial review according to subpart 4.

Subp. 4. **Suspension or debarment appeals.** If suspended or debarred, a person may file an appeal in writing with the commissioner of administration within 30 days of receipt of a decision to suspend or debar. The commissioner shall, within 45 days, decide whether the actions taken were according to statutes and regulations and were fair and in the best interest of the state.

Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

Subp. 5. **Length of debarment.** A bidder may be debarred from receiving and submitting bids for not less than one year, nor more than three years. The length of the debarment will depend on the vendor's past performance, the number and seriousness of the current complaints, and the cost to the state associated with correcting the problem.

Subp. 6. **Public list of debarred.** The division shall maintain a master list of all suspensions and debarments. The master list will retain all information concerning suspensions and debarments as a public record. The records will be maintained for at least three years following the end of a suspension or debarment. Such public information may be considered in responsible bidder determinations according to part 1230.0150, subpart 20.

1230.1175 REINSTATEMENT AND PROBATION.

Subpart 1. **Review of reinstatement applications.** The director will review vendor applications for reinstatement.

Subp. 2. **Application for reinstatement time limits.** A person who has been debarred may not seek reinstatement until one year from the end of the debarment period.

Subp. 3. **Information in reinstatement application.** A request for reinstatement must be made to the director in writing and include:

A. all information necessary to qualify as a responsible bidder, as defined in part 1230.0150, subpart 20;

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

C. 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

D. a written narrative outlining all steps taken to ensure that the cause for debarment has been corrected with appropriate supporting documentation.

Subp. 4. **Actions following decision.** The director will determine if the person can be reinstated as a responsible bidder and be added to the bidders list. If, after investigation, the petitioner's request for reinstatement is denied, the person cannot reapply for reinstatement for one year from the date of denial. If reinstated, the petitioner will be placed on the bidders list and be subject to a one-year probationary period.

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Subp. 5. **Probationary periods and conditions.** Vendor probationary periods apply to formally debarred persons who have been reinstated as responsible bidders.

The length of the probationary period will be one year from the date of reinstatement.

During the probationary period, the party on probation must respond to all bid requests received from the division.

If a bid from a vendor on probation is accepted and the vendor refuses to perform or enters into a contract and performance is substandard, the performance or supply bond, if any, will be retained and the vendor will be deemed not to be a responsible bidder and will be permanently removed from the list of bidders.

1230.1200 CONTRACT CANCELLATION.

The director ~~of procurement~~ may cancel a purchase entered into under competitive bidding under any one of the following conditions including, but not limited to:

A. the contractor agrees to the cancellation;

B. the contractor has obtained the contract by fraud, collusion, conspiracy, or in conflict with any statutory or constitutional provision of the state of Minnesota; ~~or~~

C. failure to deliver as agreed; or

D. failure to deliver within the time period stated in the invitation to bid.

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.~~

1230.1450 SCOPE.

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1399 and 1230.1400 to 1230.1910 relating specifically to the small business procurement program, parts 1230.1400 to 1230.1910 shall govern. The definitions contained in part 1230.0150 shall apply in the administration of these preference programs.

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

~~C. number of employees;~~

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~~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

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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 and expertise 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;

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(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 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.

1230.1805 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 will depend 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

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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 director or the director's designee. The director may uphold, modify, or reject the penalty. The decision of the director 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 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 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 as specified in parts 1230.1000 and 1230.1100.

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 according to part 1230.1175.

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 certified directory under subpart 3, 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 certified directory was reasonable and whether the removal is in compliance with subpart 3. 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 to the 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;

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(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 parts 1230.1000 and 1230.1100. 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~~ 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 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 1230.0150, subparts 24 and 26, and reports the awards in the format required by the division.

REPEALER. *Minnesota Rules*, parts 1230.0200; 1230.0400, subparts 1 and 3; 1230.0700, subpart 2; 1230.1500; 1230.1700, subparts 2 and 3; 1230.1800; 1230.1900, subparts 2, 3, 4, and 6; 1230.2000; 1230.2100; 1230.2200; and 1230.2300, are repealed.

Department of Health

Proposed Permanent Rules Relating to Family Planning Special Project Grants

Alternative Notices: Notice of Intent to Adopt Rules Without a Public Hearing, Notice of Intent to Adopt Rules With a Public Hearing if 25 or More Persons Request a Hearing, and Notice of Intent to Cancel Hearing if Fewer than 25 Persons Request a Hearing

I. Explanation of Alternative Notices

The Minnesota Department of Health (hereinafter "Department") is hereby giving notice of its intent to adopt rule amendments without a public hearing under the noncontroversial rulemaking procedure of *Minnesota Statutes* §§ 14.22 to 14.28 (1990). However, in case 25 or more persons request a hearing, thus necessitating that one be held pursuant to *Minnesota Statutes* § 14.25 (1990), and in order to expedite the rulemaking process should that occur, the Department is at the same time hereby giving notice of the hearing on the proposed rule amendments pursuant to *Minnesota Statutes* §§ 14.131 to 14.20 (1990). The hearing will be cancelled if 25 or more people do not request that one be held. The hearing will also be cancelled if a sufficient number of people withdraw their requests for a hearing. With the comment period closing on Friday, May 3, 1991, there will be 10 days before the scheduled hearing date which is Monday, May 13, 1991. This 10-day period will give interested persons ample time to contact the Department to find out whether the hearing will be cancelled and to plan accordingly.

II. Notice of Intent to Adopt Rule Amendments Without a Public Hearing

NOTICE IS HEREBY GIVEN that the Minnesota Department of Health (hereinafter "Department") proposes to adopt the above-captioned rule amendments without a public hearing unless 25 or more persons submit written requests for a public hearing. The Department has determined that the proposed changes will be noncontroversial in nature and has elected to follow procedures set forth in *Minnesota Statutes* §§ 14.22 to 14.28 (1990).

Interested persons shall have until May 3, 1991 to submit comments in support of or in opposition to the proposed rule amendments. Comment is encouraged. Each comment should identify the portion of the proposed rule amendments being addressed, the reason for the comment, and any change proposed to the rule amendments by the comment. The proposed rule amendments may be modified if the modifications are supported by the data and views submitted to the Department and do not result in a substantial change in the proposed language.

In addition to submitting comments, interested persons may request in writing, during the comment period, that a hearing be held on the proposed rule amendments. Any person requesting a hearing should state his or her name, address, and telephone number and is encouraged to identify the portion of the proposed rule amendments addressed, the reason for the request, and any changes they want made to the proposed rule amendments. If a person desires that a hearing be held on only a portion of the proposed rule amendments, it is requested that the Department be informed of the specific amendments on which a hearing is being requested at the time that the hearing request is made. This will enable the Department to limit the hearing, if one is held, to the specific issues of concern. A public hearing will be held only if 25 or more persons submit in writing requests for a hearing on the proposed rule amendments or a portion thereof by May 3, 1991. If a hearing is required, it will be held in accordance with the provisions of *Minnesota Statutes* §§ 14.131 to 14.20 (1990) and the hearing notice provided in Part III below.

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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

Emergency Rule Relating to the Small Business Procurement Program

Notice Extending the Termination Date of the Rule

NOTICE IS HEREBY GIVEN that the Department of Administration is extending the termination date for the emergency rule concerning the Small Business Procurement Program from April 17, 1991 to October 12, 1991.

The rule contained in *Minnesota Rules* 1230.1400 through 1230.1910 was adopted under emergency rule making authority and appeared in the *State Register* on November 5, 1990 (15 S.R. 1078). The rule became effective on October 19, 1990. The effective period for rules adopted under emergency provisions may not exceed 180 days as specified in *Minnesota Statutes* section 14.35. The rule can be continued in effect for another 180 days upon published notice.

The Department has published notice previously of intent to adopt the provisions of the emergency rule as a permanent rule. The extension will keep the existing emergency rule in effect until the permanent rule adoption process can be completed.

Dated: 1 April 1991

Dana B. Badgerow
Commissioner of Administration

Errata

Department of Administration

Proposed Permanent Rules Relating to State Contracts and the Small Business Procurement Program

The Notice of Intent to Adopt the above entitled rule published on April 1, 1991 on page 2165 of the *State Register* is hereby amended to incorporate the following:

These proposed rules will impact small businesses which make applications to participate, and which do participate, in the MN Small Business Procurement Program. This program is directed at certain categories of small businesses, and allows those eligible small businesses preferential treatment in the state purchasing process. To enjoy the benefits of this program, the small business must submit certain financial and other information in order for the Department to determine if the small business is eligible for the program. All information required is normally in the hands of the business owner, therefore the impact and regulations are reasonable. Further information regarding the impact on small business is available in the Statement of Need and Reasonableness.

The 30-day comment period is hereby extended an additional seven (7) days.

Dated: 1 April 1991

Dana B. Badgerow
Commissioner of Administration

National Association Of Minority Contractors Of Minnesota
A Multi-Ethnic Construction Trade Association

April 11, 1991

Robert J. Baldwin
Minnesota Department of Administration
Materials Management Division
Room #12
50 Sherburne Avenue
Saint Paul, Minnesota 55755

Dear Mr. Baldwin:

Please accept our formal request for a public hearing on Mr 1230.1400 through 1230.1910. Public policy surely dictates that a subject as sensitive as the Small Business Procurement Program, deserves a public hearing.

Based on John Haggerty's April 2, 1991 notice extending the termination date, we will just relay our request for a public hearing at some point in time October 12, 1991.

AREAS OF CONCERN:

Page 5	Subp. 23, Targeted Group business lines 7 through 12.
Page 6 & 7	Subp. 3, List of bidders, lines 10 through 16.
Page 17&18	Subp. 3, Revenue or sales limitations; Minnesota Small Business Programs. Lines 32 through 35, lines 1 through 6.
Page 33&34	1230.1810, Proportional utilization of Socially Disadvantage Businesses. Lines 24 through 35 and lines 1 through 23.
Page 34	Subp. 1, Goal setting, lines 26 through 35.

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Page 35	Lines 1 through 7.
Page 35	Subp. 3 Waivers lines 8 through 32.
Page 35,36,37,	Subp. 4 Incentives and penalties. Lines 33 through 36, lines 1 through 36, lines 1 through 30, page 37.
Page 40	Lines 14, 1230.1860. Limits to Program Participation. Lines 14 through 35.
Page 41	Lines 1 through 31.

As you can see our organization has some concerns with the rule as proposed. I have discussed this matter with other contractors in our organization and they find the rule confusing. We would like the language to be more specific. It is obvious a lot of time has been spent on this matter, but an intent/clarification presentation would help those who have to operate a business under the rule.

Sincerely,

Richard A. Copeland
President,

RAC/cj

MBEIC

MINORITY BUSINESS ENTERPRISE IN-PUT COMMITTEE

MINNESOTA MINORITY PURCHASING COUNCIL

April 11, 1991

Robert J. Baldwin
Minnesota Department of Administration
Materials Management Division
Room #12
50 Sherburne Avenue
Saint Paul, Minnesota 55755

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Page 6 & 7	Subp. 3, List of bidders, lines 10 through 16.
Page 17 & 18	Subp. 3, Revenue or sales limitations; Minnesota Small Business Programs. Lines 32 through 35, lines 1 through 6.
Page 33 & 34	1230.1810, Proportional utilization of Socially Disadvantage Businesses. Lines 24 through 35 and line 1 through 23.
Page 34	Subp. 1, Goal setting, lines 26 through 35.

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Page 35	Lines 1 through 7.
Page 35	Subp. 3 Waivers lines 8 through 32.
Page 35,36,37	Subp. 4 Incentives and penalties. Lines 33 through 36, line 1 through 36, lines 1 through 30, page 37.
Page 40	Lines 14, 1230.1860. Limits to Program Participation. Lines 14 through 35.
Page 41	Lines 1 through 31.

As you can see our organization has some concerns with the rule as proposed. I have discussed this matter with other contractors in our organization and they find the rule confusing. We would like the language to be more specific. It is obvious a lot of time has been spent on this matter, but an intent/clarification presentation would help those who have to operate a business under the rule.

Sincerely,

Richard A. Copeland
Chairman
MBEIC

RAC:bam

MINNESOTA AFRICAN AMERICAN CHAMBER OF COMMERCE

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April 11, 1991

Robert J. Baldwin
Minnesota Department of Administration
Materials Management Division
Room #12
50 Sherburne Avenue
Saint Paul, Minnesota 55755

Dear Mr. Baldwin:

Please accept our formal request for a public hearing on MR 1230. 1400 through 1230.1910. Public policy surely dictates that a subject as sensitive as the Small Business Procurement Program deserves a public hearing.

Based on John Haggerty's April 2, 1991 notice extending the termination date, we will just relay our request for a public hearing at some point in time before October 12, 1991

Areas of Concern: Page 5 subp. 23, targeted group business lines 7 through 12. Page 6 and 7 Subp. 3, list of bidders, lines 10 through 16. Page 17 and 18 subp. 3, revenue or sales limitations; Minnesota Small Business Programs. Lines 32 through 35, lines 1 through 6. Page 33 and 34, 1230.1810, proportional utilization of Socially Disadvantage Businesses. Lines 24 through 35 and lines 1 through 23. Page 34 subp. 1, goal setting, lines 26 through 35. Page 35, lines 1 through 7. Page 35, subp.3 waivers lines 8 through 32. Pages 35, 36, 37, subp.4, Incentives and penalities. Lines 33 through 36, lines 1 through 36 and lines 1 through 300 page 37. Page 40 Lines 14 1230.1860, limits to program participation, lines 14 through 35. Page 41, lines 1 through 31.

As you can see our chamber has some concerns with the rule as proposed. I've polled other individuals and organizations and they too find the rule confusing, or not clear. We are more

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interested in the basic intent of the language, which is subject to interpretation, and we would like the language to be specific. It is obvious a lot of time has been spent on this matter, but an intent/clarification presentation would help those who have to operate a business under the rule.

Sincerely,

Robert Randle
Executive Director, ~~MACC~~

RR/cj

CC: Minnesota Hispanic Chamber of Commerce
Asian Pacific Chamber of Commerce
Minnesota American Indian Chamber of Commerce

MINNESOTA
HISPANIC CHAMBER
OF COMMERCE

209 West Page St. Ste 211
St. Paul, MN 55107

612 222 – 0569

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(May 1990 – April, 1991)

April 24, 1991.

Robert J Baldwin
Minnesota Department of Administration
Materials Management Division, Rm #12
50 Sherburne Avenue
St Paul, MN 55755

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Sincerely,

Lynda Rangel Fjerstad

Lynda Rangel Fjerstad
MHCC Chairperson

LRF/pm

CC: Spanish Speaking Affairs Council
Clues

WELLS ENGINEERS MINNESOTA, INC.

123 NORTH THIRD STREET
SUITE 712
MINNEAPOLIS, MINNESOTA 55401
(612) 332-6093

April 30, 1991

Mr. Robert J. Baldwin
Minnesota Department of Administration
Materials Management Division, Room #112
50 Sherburne Avenue
St. Paul, MN 55155

RE: Request For A Public Hearing

Dear Mr. Baldwin:

I am writing to request a public hearing on Proposed Permanent Rules Relating to Business pertaining to the "Small Business Procurement Program" 1230.1400 through 1230.1910.

I am writing from the perspective of an owner of a small engineering firm, specializing in the design of highways and bridges. I believe a public hearing is necessary to clarify some rules and to discuss the appropriateness of others.

Part 1230.1860 - Limits to Program Participation

1. While I agree with the premise that the program should not be open-ended I believe that the proposed limitations will prevent certain firms from becoming viable without the program. Many engineering firms earn large portions of their revenue from the public sector. These are firms that design bridges, highways, traffic control systems, waterways, dams, sewer systems, water and waste water treatment plants, etc. To require Targeted Group Businesses to find work in the private sector to a greater extent than other firms is an unreasonable burden.

2. Paragraph A. What is meant in this section by "total anticipated awards"? Does this include total budget for all construction, consultant services and supplies or are each of these looked at separately? Is the Metropolitan Council a

separate agency covered under this statute or is it included in the Department of Administration? Where did the 3/10% limitation arise from and what does this figure represent say in the 1990 budget?

3. Paragraph B. As I discussed above, many engineering firms do a majority of their work for the public sector since there are few private sector clients that build bridges, water treatment plants, etc. The limitations in this paragraph would prevent small firms from ever growing large enough to compete with large ones since public sector projects are most often too large for a small firm to handle alone.

4. Professional engineering services are awarded using the Qualification Based Selection (QBS) process. QBS promotes competition among engineering firms and provides the public with the best in engineering design. We firmly believe in the QBS process. As a small business we cannot however, compete on equal footing with firms ten times our size for projects that are twice our annual revenue. We do compete however with other TGB's to secure the goal amount of a large project when we market to large firms. In fact, we have been required to submit a proposal and be interviewed (typical QBS process) by our clients for some projects. Therefore, the term "normal competitive bid process" would not apply to procurement of engineering services.

5. Paragraph C. What is a "proportionate share of its market for asset employed"? Does this apply to each agency individually?

Part 1230.1910 - Consultant, Professional and Technical Procurements

1. Applicability. How do the agencies apply these rules to professional design services? Are goals to be established on a per-project basis or another way? Are agencies currently applying rules to their consultant procurements?

Thank-you for your work on this procurement program and for giving these matters your attention. I believe that the State Legislature has indicated its belief that small businesses are a valuable part of the Minnesota economy by passing the laws establishing the program. It is my belief that the State is interested in doing business with small firms such as ours. I would be disappointed if the rules adopted created so many barriers that the State of Minnesota, Metro Council and University of Minnesota would be forced to do business with large design firms.

Sincerely,

WELLS ENGINEERS MINNESOTA, INC.

Shirley M. Walker

Shirley M. Walker, P.E.
President

SMW/ms

wp/12301860

Lynne Bly & Associates, Inc.

10631 Penfield Avenue Circle North, Stillwater, MN 55082
(612) 439-9234 MODEM/FAX (612) 430-0115

May 7, 1991

Mr. Robert Baldwin
Minnesota Department of Administration
Materials Management Division
Room 112
50 Sherburne Avenue
St. Paul, MN 55155

RE: Proposed Permanent Rules Relating to Business

Dear Mr. Baldwin:

Lynne Bly & Associates, Inc. (LBA) is a women owned consulting business, certified by your agency, MnDOT, and the Metropolitan Council as being a disadvantaged or targeted business. I wish to raise two reservations about the above referenced rules as presented in the April 1, 1991 State Register.

Business for small consulting firms, like LBA, is variable. In one year, the client mix can be many different public or private entities; in another, a single large project can dominate the work effort. I am concerned that the limitations to participation, as contained in Section 1230.1960 of the proposed rules are not sensitive to the nature of such business cycles.

As I read the proposed rule, the situation I described above, where a single large contract dominates one year's work effort, could preclude a firm from participation in the program in the subsequent year. This is a significant disadvantage to small firms. I suggest that a revision which addresses a sustained pattern over more than two years might be a more appropriate measure of a firm's dependence on preferential programs.

Our business practice is focussed in the areas of environmental and land use planning. The number of certified firms from targeted groups in these areas of practice is small. On the whole, we believe that the majority of our work is obtained in recognition of the professional capabilities and experience we bring to a team. In many instances we are placed in roles which bring our participation to levels well beyond those specified as a goal for targeted groups. I am particularly concerned that in making your determinations under Section 1230.1960, that work over and above a set-aside level not be included in the calculation of the percentage of revenue from set-aside/preference. To do so would seem to be contrary to the overall goal of increasing the capabilities and professional recognition for firms such as mine.

I might add, that to the degree the rules require targetted businesses to maintain records or discolse information where there are not comparable requirements of prime contractors or other businesses, the rules are subtlely discriminatory. Particularly for small businesses, a significant increase in record keeping can greatly add to an increase in time required for overhead vs. productive/billable work.

If you wish to discuss these issues, please do not hesitate to call me. Thank you for your consideration.

Sincerely,

Lynne E. Bly