



Rules of
Office of Administration
Division 30—Division of Facilities Management,
Design and Construction
Chapter 5—Minority/Women Business
Enterprises

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Title 1—OFFICE OF ADMINISTRATION

Division 30—Division of Facilities Management, Design and Construction Chapter 5—Minority/Women Business Enterprises

1 CSR 30-5.010 Minority/Women Business Enterprise Participation in State Con- struction Contracts

PURPOSE: This regulation establishes a uniform program by which Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) may participate in construction contracts let by the state of Missouri. This regulation provides that the state of Missouri, except to the extent that the commissioner of the Office of Administration determines otherwise, shall require that for contracts bid and awarded in an amount greater than or equal to one hundred thousand dollars (\$100,000), the successful bidder shall have as a goal subcontracting not less than ten percent (10%) of the awarded contract price for work to be performed in the St. Louis or Kansas City metropolitan areas to MBE/WBE(s), and shall have as a goal subcontracting not less than five percent (5%) of the awarded contract price for work to be performed in other than the St. Louis or Kansas City metropolitan areas to MBE/WBE(s).

(1) Definitions.

(A) "Bidder" means one who submits a response to a solicitation by the Office of Administration for construction services.

(B) "Bid" means a bid proposal or bid submitted to the Division of Facilities Management, Design and Construction by a bidder.

(C) "Compliance" means the condition existing when a bidder or contractor has met and implemented the requirements of these regulations.

(D) "Contract" means a mutually binding legal relationship or any modifications obligating the contractor to furnish construction supplies or services.

(E) "Contractor" means one who participates, through a contract or subcontract, in any program covered by these regulations.

(F) "Commissioner" means the commissioner of the Office of Administration.

(G) "Director" means the director of the Division of Facilities Management, Design and Construction.

(H) "Joint venture" means an association of two (2) or more businesses to carry out a single business enterprise for profit for which

purpose they combine their property, capital, efforts, skills and knowledge.

(I) "MBE" means Minority Business Enterprise.

(J) "Minority" means

1. "Black Americans," which includes persons having origins in any of the black racial groups of Africa;

2. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin regardless of race;

3. "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;

4. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific or the Northern Marianas; or

5. "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan or Bangladesh.

(K) "Minority Business Enterprise" means a business concern which is at least fifty-one percent (51%) owned by one (1) or more minorities as defined in (1)(J) or in the case of any publicly-owned business at least fifty-one percent (51%) of the stock of which is owned by one (1) or more minorities as defined in (1)(J) and whose management and daily business operations are controlled by one (1) or more minorities as defined in the rule.

(L) "OA" means the Office of Administration.

(M) "Kansas City Metropolitan Area" means the City of Kansas City and the Missouri counties of Ray, Platte, Jackson, Cass and Clay.

(N) "St. Louis Metropolitan Area" means the City of St. Louis and the Missouri counties of Franklin, St. Charles, St. Louis and Jefferson.

(O) "WBE" means women business enterprise.

(P) "Women Business Enterprise" means a business concern which is at least fifty-one percent (51%) owned by one (1) or more women or in the case of any publicly-owned business at least fifty-one percent (51%) of the stock of which is owned by one (1) or more women and whose management and daily business operations are controlled by one (1) or more women.

(2) Contract Amount. This regulation applies to any state of Missouri construction contract awarded to a successful bidder in a bid amount equal to or greater than one hundred thousand dollars (\$100,000).

(3) Discrimination Prohibited. No person shall be excluded from participation in, or denied the benefits of, or otherwise be discriminated against in connection with the award and performance of any contract covered by this regulation, on the grounds of race, color, sex or national origin.

(4) Commissioner, Duties and Responsibilities.

(A) The commissioner shall, through the Office of Supplier and Workforce Diversity—

1. Compile, maintain and make available a directory of MBE/WBEs along with their capabilities relevant to general contracting requirements and to particular solicitations. The commissioner shall make the directory available, upon request, to all bidders and contractors. The directory shall specify the name of the MBE/WBE, the type of business it conducts, its address, phone number and contact person;

2. To the extent deemed appropriate, include all MBE/WBEs on open solicitation mailing lists;

3. Instruct the director and the Office of Supplier and Workforce Diversity to annually report in writing to the commissioner concerning the awarding of contracts to MBE/WBEs; and

4. Certify the eligibility of MBE/WBEs and joint ventures involving MBE/WBEs. The commissioner may accept certification made by other municipalities, counties, state and federal agencies which meet the minimum requirement for Office of Administration certification.

(5) Percentage Goals and Compliance.

(A) For contracts bid and awarded in an amount greater than or equal to one hundred thousand dollars (\$100,000), the successful bidder shall have as an overall goal subcontracting not less than ten percent (10%) of the awarded contract price for work to be performed in the St. Louis or Kansas City metropolitan areas to MBE/WBEs, and shall have as an overall goal subcontracting not less than five percent (5%) of the awarded contract price for work to be performed by WBEs. Individual project goals may be set higher than the overall goals in areas where participation is demonstrated to be higher such as the St. Louis and Kansas City metropolitan areas. Individual project goals may be set lower than the overall goals in areas where participation is demonstrated to be lower, such as rural communities.

(B) If after the contract has been awarded to the contractor, the contractor fails to meet or maintain the percentage goal, s/he must satisfactorily explain to the director why the



goal cannot be achieved and why meeting the goal was beyond the contractor's control.

(C) If the director finds the contractor's explanation unsatisfactory, the director may take any appropriate action, including, but not limited to:

1. Declaring the contractor ineligible to participate in any state contracts administered through the Office of Administration for a period not to exceed six (6) months; and
2. Declaring the contractor in breach of contract.

(6) Waiver.

(A) A bidder is required to make a good faith effort to locate and contract with MBE/WBEs. If a bidder has made a good faith effort to secure the required MBE/WBEs and has failed, s/he may submit with his/her bid proposal the information requested on forms provided with the bid documents. The director will review the bidder's actions as set forth in the bidder's submittal documents and other factors deemed relevant by the director, to determine if a good faith effort has been made to meet the applicable percentage goal. If the bidder is judged not to have made a good faith effort, the bid shall be rejected.

(B) Bidders who demonstrate that they have made a good faith effort to include MBE/WBE participation will be awarded the contract regardless of the percent of MBE/WBE participation, provided the bid is otherwise acceptable.

(C) In reaching his/her determination of good faith, the director may evaluate, but is not limited to, the following factors:

1. The bidder's efforts to develop and sustain a working relationship with MBE/WBEs;
2. The bidder's efforts and methods to provide MBE/WBEs with full sets of plans and specification or appropriate sections thereof sufficient to prepare a proposal to the bidder;
3. The bidder's efforts and methods to inform multiple local MBE/WBEs about the proposed work in a timely manner and define for them the specific scope of work for which a proposal is requested;
4. The bidder's efforts to make initial contact with at least three (3) MBE/WBEs for each category of work to be performed, follow-up with those contacted and receive a proposal for those categories of work;
5. Reasons for rejecting MBE/WBE's proposal;
6. The extent to which the bidder divided work into projects suitable for subcontracting to MBE/WBEs;

7. The bidder's ability to provide sufficient evidence in the form of documentation that supports the information provided; and

8. Actual participation of MBE/WBEs achieved by the bidder.

(7) Bidder's Duties and Responsibilities.

(A) The bidder shall submit with his/her bid proposal the information requested on the form provided for every MBE/WBE the bidder intends to use on the contract work.

(B) If the MBE/WBE is a joint venture, and one (1) or more coventurers is not certified as a MBE/WBE, the bidder shall submit with his/her bid proposal the information requested on the form provided.

(C) The bidder shall use MBE/WBEs certified by the Office of Administration for other municipalities, counties, state or federal agencies.

(D) If a MBE/WBE is replaced during the course of the contract, the contractor shall make a good faith effort to replace it with another MBE/WBE. All substitutions shall be approved by the director.

(E) Successful bidders shall provide the director monthly reports on the bidder's progress in meeting its MBE/WBE obligations.

(8) Counting MBE/WBE Participation Toward Meeting MBE/WBE Goals.

(A) The total dollar value of the work granted to the MBE/WBE by the successful bidder is counted towards the applicable goal of the entire contract.

(B) A bidder may count towards his/her MBE/WBE goals that portion of the total dollar value granted to a certified joint venture equal to the percentage of the ownership and control of the MBE/WBE partner in the joint venture.

(C) A bidder may count toward his/her MBE/WBE goal only expenditures to MBE/WBEs that perform a commercially useful function in the work of a contract.

1. A MBE/WBE is considered to perform a commercially useful function when it is responsible for executing a distinct element of the work contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether a MBE/WBE is performing a commercially useful function, the director shall evaluate the amount of work subcontracted by the MBE/WBE, industry practices and any other relevant factors.

2. A MBE/WBE may subcontract a portion of the work. If a MBE/WBE subcontracts a greater portion of the work than would be expected on the basis of normal industry practices, the MBE/WBE shall be

presumed not to be performing a commercially useful function. The MBE/WBE may present evidence to rebut this presumption to the bidder. The bidder's decision on the rebuttal of this presumption is subject to review by the director.

(D) A bidder may count toward his/her MBE/WBE goals only that portion of work performed at the lowest subcontract level such that the percentage of work performed by MBE/WBEs cannot exceed one hundred percent (100%).

1. A MBE/WBE is considered to perform a commercially useful function when it is responsible for executing a distinct element of the work contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether a MBE/WBE is performing a commercially useful function, the director shall evaluate the amount of work subcontracted by the MBE/WBE, industry practices and any other relevant factors.

2. A MBE/WBE may subcontract a portion of the work. If a MBE/WBE subcontracts a greater portion of the work than would be expected on the basis of normal industry practices, the MBE/WBE shall be presumed not to be performing a commercially useful function. The MBE/WBE may present evidence to rebut this presumption to the bidder. The bidder's decision on the rebuttal of this presumption is subject to review by the director.

(E) A bidder may count toward its MBE/WBE goals expenditures for materials and supplies obtained from MBE/WBE suppliers and manufacturers, provided that the MBE/WBE assumes the actual and contractual responsibility for the provision of the materials and supplies.

1. The bidder may count its entire expenditure to a MBE/WBE manufacturer. For the purposes of this regulation, a manufacturer shall be defined as an individual or firm that produces goods from raw materials or substantially alters them before resale.

2. The bidder may count its entire expenditures to MBE/WBE suppliers provided that the MBE/WBE supplier performs a commercially useful function, as defined in paragraph (8)(C)1. of this rule, in the supply process.

(9) Maintenance of Records and Reports. The director shall maintain records identifying and assessing the contractor's progress in achieving and maintaining MBE/WBE percentage goals. These records shall show—

(A) Procedures which have been adopted by the contractor to comply with the requirements of these regulations;



(B) The amount and nature of awards made by the contractor to MBE/WBEs; and

(C) Monthly reports from the contractor on its progress in meeting MBE/WBE goals.

(10) Certification of MBE/WBEs.

(A) Bidders shall submit with their bid proposals the information requested as appropriate on forms provided for that purpose in the bid documents to certify joint venture firms wishing to participate as MBE/WBEs under these regulations.

(B) Except as provided in subsection (10)(C) that follows, each firm or individual seeking certification to participate as a MBE/WBE in a state contract shall complete and submit to the commissioner the information requested on forms provided for that purpose. Minority or women partners in a joint venture shall submit to the commissioner the information requested on forms provided in the bid documents for that purpose. The information must be provided by an authorized representative of the firm or individual.

(C) A firm or individual seeking to participate as a MBE/WBE under these regulations need not submit the information described in (10)(A) and (B) if the potential MBE/WBE states in writing that it has submitted the same information to or has been certified by the commissioner within the last five (5) years and has filed with the commissioner an annual update to the information requested; or the potential MBE/WBE has been certified as a MBE/WBE by another Missouri municipality, county, state agency or federal agency within the last five (5) years.

(D) Individuals and firms certified under this regulation shall be placed on the MBE/WBE directory list.

(E) Once a MBE/WBE is certified, the certification shall be effective for a period not to exceed five (5) years.

(11) Eligibility Standards.

(A) The following standards shall be used by the commissioner in determining whether a firm is owned and controlled by one (1) or more minority/women and is therefore eligible to be certified as a MBE/WBE. Businesses aggrieved by the commissioner's determination may appeal in accordance with procedures set forth in section (12).

1. Bona-fide membership in a minority group shall be established on the basis of the individual's claim that s/he is a member of such a minority group and is so regarded by the particular minority community. However, the commissioner is not required to accept this claim if s/he determines the claim to be invalid.

2. An eligible MBE/WBE under these regulations shall be an independent business. The ownership and control by the minority/women shall be real, substantial and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents. The minority/women shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with ownership interests, as demonstrated by examination of the substance rather than form of the arrangement. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a MBE/WBE. In determining whether a potential MBE/WBE is an independent business, the commissioner shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the construction contract, and the degree to which financial, equipment leasing and other relationships with nonminority firms vary from industry practices.

3. The MBE/WBE owners shall also possess the power to direct or cause the direction of 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 shall not be subject to any formal or informal restrictions which limit the customary discretions of the minority/women owner(s). There shall be no restriction through, for example, bylaw provisions, partnership agreements or charter requirements for cumulative voting rights or otherwise that prevent the minority/women owner(s) from making a business decision of the firm without the cooperation or vote of any owner who is not a minority/woman.

4. If the owners of the firm who are not minorities/women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities/women and shall not be considered a MBE/WBE within the meaning of these regulations. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of these regulations, be considered as controlling the business.

5. All securities which constitute ownership and/or control of a corporation for purposes of establishing it as a MBE/WBE under these regulations shall be held directly by minority/women. No securities held in trust, or by any guardian for a minor, shall be considered as held by minority/women in determining the ownership or control of a corporation.

6. The contributions of capital or expertise by the minority/women to acquire their interests in the firm shall 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 minority/women, or the mere participation as an employee rather than as a manager.

7. In addition to the standards set out in this section, the commissioner shall give special consideration to the following circumstances in determining eligibility:

A. Newly formed firms and firms whose ownership and/or control has changed since the date of advertisement of the construction contract shall be closely scrutinized to determine the reasons for the timing of the formation of or change in the firm;

B. A previous and/or continuing employer-employee relationship between or among present owners shall be carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities discussed in this section; and

C. Any relationship between a MBE/WBE and a business which is not a MBE/WBE which has an interest in the MBE/WBE shall be carefully reviewed to determine if the interest of the non-MBE/WBE conflicts with the ownership and control requirements of this section.

(B) A joint venture is eligible under these regulations if the minority/woman partner of the joint venture meets the standards for eligible minorities/women set forth previously and the minority/woman partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks and profits of the joint venture.

(C) A business wishing to be certified as a MBE/WBE or a joint venture MBE/WBE by the commissioner shall cooperate with the commissioner in supplying any additional information which may be requested in order to make a determination.

(D) Once certified, a MBE/WBE shall update its submission annually by submitting to the commissioner the information requested on forms provided for that purpose or by certifying that the information requested that is on file with the commissioner is still accurate. Anytime there is a change in ownership or control of the firm, the MBE/WBE shall update the previously filed information requested.

(E) Failure of a certified MBE/WBE to update or submit this information shall disqualify the firm or individual from further participation as a MBE/WBE until such time that the information is filed by the firm or



individual and approved by the commissioner.

(F) Except as provided in section (12), the denial of the certification by the commissioner shall be final for that contract and other contracts being let by the commissioner at the time of the denial of certification. MBE/WBE and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts.

(G) The commissioner shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential information, consistent with federal, state and local law.

(12) Appeals and Denials of Certification as MBE/WBE.

(A) Any firm or individual who believes that it has been wrongly denied certification as a MBE/WBE or joint venture by the commissioner may file an appeal in writing, signed and dated, with the commissioner. The appeal shall be filed no later than ten (10) days after the date of denial of certification. The commissioner may extend the time for filing or waive the time limit as necessary, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as a MBE/WBE or joint venture may advise the commissioner. Challenges by third parties are not considered an appeal pursuant to this section.

(B) The commission may deny the MBE/WBE or joint venture eligibility to participate as a MBE/WBE in state construction contracts let during the pendency of the appeal.

(C) All parties shall cooperate fully with the commissioner during the appeal. Any party failing or refusing to furnish requested information or to cooperate in any other way may be declared by the commissioner to be ineligible to participate in any state contracts administered through the Office of Administration for a period not to exceed six (6) months.

(D) The commissioner shall make one (1) of the following determinations and inform the MBE/WBE or joint venture in writing of the reasons for the determination:

1. The MBE/WBE or joint venture is certified; or

2. The MBE/WBE or joint venture is not eligible to be certified and is denied eligibility to participate as a MBE/WBE in any state construction contract until a new application for certification is approved by the commissioner.

(13) Willful Provision of Incorrect Information. If at any time the commissioner has reason to believe that a person or firm has willfully and knowingly provided incorrect information or made false statements in regard to the requirements of these regulations, the commissioner may take any action deemed appropriate, including: but not limited to:

(A) Not allow the person or firm to participate in any state construction contracts for a period of six (6) months from the determination that incorrect information has been willfully and knowingly provided; and

(B) Take any legal or equitable actions pursuant to a breach of contract.

(14) Nothing in this regulation shall limit or affect the commissioner's functions and rights to determine the qualification, responsibilities and reliability of any individual, firm or other entity to participate in state contracts.

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**Original authority: 8.320, RSMo 1958, amended 1965.*