

CHAPTER 1230

DEPARTMENT OF ADMINISTRATION

DIVISION OF MATERIALS MANAGEMENT

STATE CONTRACTS

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BIDDING AND CONTRACTS

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 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 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.

(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. "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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.0200 [Repealed, 16 SR 194]

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.

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.

Statutory Authority: *MS s 16B.04; 16B.07; 16B.18; 16B.19; 16B.22*

History: *11 SR 1784; 16 SR 194*

1230.0400 SUBMISSION OF ADVERTISED BIDS.

Subpart 1. [Repealed, 16 SR 194]

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. [Repealed, 16 SR 194]

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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.

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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. [Repealed, 16 SR 194]

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.0800 AWARD OF CONTRACTS.

Award of contracts shall be made in conformity with Minnesota Statutes, section 16B.09 and with no material variance from the terms and conditions of the bid invitation.

Statutory Authority: *MS s 16B.04 subd 1*

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 awarded a contract who fails to enter into the contract 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.

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194; 17 SR 1279*

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 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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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.

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.1300 REHABILITATION FACILITY.

Any rehabilitation facility wishing to apply to receive notice of available state contracts pursuant to Minnesota Statutes, section 16B.18 shall apply in writing to the director of the Minnesota Association of Rehabilitation Facilities.

Statutory Authority: *MS s 16B.04 subd 1*

History: *L 1988 c 689 art 2 s 268*

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.1500 [Repealed, 16 SR 194]

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

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

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

Subp. 3. Revenue or sales limitations; Minnesota Small Business Program. For the purpose of identifying businesses eligible to participate in the Minnesota Small Business

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

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

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

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

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

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.1700 CERTIFICATION OF ELIGIBILITY.

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

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

B. which type of designation; 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 1230.0150, 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 1230.0150, 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 Economic Security; or

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

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

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

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

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

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

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

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

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

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

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

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

(1) assets:

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

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

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

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

(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 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 to date;

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

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

(3) income data:

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

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

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

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

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

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

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

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

I. Denials of certification under these provisions are subject to appeal under subpart 6.

Subp. 2. [Repealed, 16 SR 194]

Subp. 3. [Repealed, 16 SR 194]

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

Subp. 5. **Grounds for rejecting application.** An applicant shall be notified in writing of the acceptance or rejection of the application, within 30 days of receipt of the application

form and all supporting documents required by the division. An application shall be rejected on any of the following grounds:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) percent profit before taxes/tangible net worth;
- (b) percent profit before taxes/total assets;
- (c) percent depreciation, depletion, amortization/sales; and
- (d) percent officers' compensation/sales;

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

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

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

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194; L 1994 c 483 s 1*

1230.1800 [Repealed, 16 SR 194]

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 divi-

sion's determination of sufficient availability of certified targeted group subcontractors for the specialties involved.

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

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

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

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

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

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

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

- (a) subtract the established goal plus three percent from 25 percent;
- (b) divide six percent of the project or \$60,000, as appropriate, by the number of percentage points in unit (a); and
- (c) multiply the result of unit (b) by the number of percentage points exceeding goal plus three percent.

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

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 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 economically disadvantaged small business within 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 bids by the certified small businesses.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 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 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 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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.1860 LIMITS TO PROGRAM PARTICIPATION.

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

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

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

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

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

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

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

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

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16B.19, subdivision 2b, designation of targeted groups, and a new study conducted by the

commissioner of administration finds the original conditions defining eligibility and certification no longer exist;

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

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

(a) 200 percent in year one;

(b) 175 percent in years one and two;

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

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

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

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

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 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 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. [Repealed, 16 SR 194]

Subp. 3. [Repealed, 16 SR 194]

Subp. 4. [Repealed, 16 SR 194]

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. [Repealed, 16 SR 194]

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *L 1983 c 289 s 115 subd 1; L 1987 c 312 art 1; 16 SR 194*

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.

Statutory Authority: *MS s 16B.04; 16B.18; 16B.19; 16B.22*

History: *16 SR 194*

1230.2000 [Repealed, 16 SR 194]

1230.2100 [Repealed, 16 SR 194]

1230.2200 [Repealed, 16 SR 194]

1230.2300 [Repealed, 16 SR 194]

DEBARMENT AND SUSPENSION

1230.3000 SCOPE.

Parts 1230.3000 to 1230.4300 apply to all Mn/DOT contracts.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*

1230.3100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in parts 1230.3000 to 1230.4300 have the meanings given them in this part.

Subp. 2. **Administrative law judge.** "Administrative law judge" means a person appointed under Minnesota Statutes, section 14.48 or 14.49 and assigned under Minnesota Statutes, section 14.50 to hear contested cases.

Subp. 3. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, or supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 4. **Commissioner.** "Commissioner" means the commissioner of the Department of Administration.

Subp. 5. **Contract crime.** "Contract crime" means a violation of state or federal anti-trust law, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false state-

ments, falsification or destruction of records, or other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract.

Subp. 6. **Contractor.** "Contractor" means a person to whom the Minnesota commissioner of transportation has awarded a Mn/DOT contract for which competitive bids are required or taken.

Subp. 7. **Conviction.** "Conviction" has the meaning given to it in Minnesota Statutes, section 609.02, subdivision 5.

Subp. 8. **Debar.** "Debar" means to disqualify under parts 1230.3100 to 1230.4300 from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

Subp. 9. **Mn/DOT contract.** "Mn/DOT contract" means a written instrument:

A. containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, or acts as an agent for a party under Minnesota Statutes, section 161.36, subdivisions 2 and 3, 360.016, subdivisions 2 and 3, or 360.039, subdivisions 2 and 3;

B. for which competitive bids are required or taken; and

C. which is subject to the approval of the commissioner.

Subp. 10. **Person.** "Person" means a natural person or a business.

Subp. 11. **Principal.** "Principal" means an officer, director, or partner, or an employee or shareholder engaged in management of the business.

Subp. 12. **Suspend.** "Suspend" means to temporarily disqualify from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3200 GROUNDS FOR DEBARMENT.

Subpart 1. **Contract crime.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for commission of a contract crime or when a conviction is imputed to the business under part 1230.3300.

Subp. 2. **Violation of antitrust laws.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for violating Minnesota Statutes, sections 325D.49 to 325D.66 or federal antitrust laws, or when a conviction is imputed to the business under part 1230.3300.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3300 CONVICTION OF PERSON IMPUTED TO BUSINESS.

The conviction of a person for offenses listed in part 1230.3200 is imputed to a business when the conduct which gave rise to the conviction occurred in connection with the person's performance of duties for or on behalf of that business and in the course of employment or with the knowledge, approval, acquiescence, or subsequent ratification of the conduct by the business.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3400 DEBARMENT PROCEDURE.

Subpart 1. **Requirement.** A business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 2. **Three-year limitation.** A debarment or a suspension must be initiated within three years from the date of the conviction of a business for an offense described in part 1230.3200.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3500 TERM OF DEBARMENT.

The administrative law judge shall recommend and the commissioner of transportation shall establish the term of debarment. The term of debarment depends upon: the seriousness of the offense; whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; the state's need to preserve the competitive bidding process; and whether the business is debarred or has been debarred in another jurisdiction. The length of the debarment period in another jurisdiction must be taken into account in determining the term of debarment in Minnesota.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3600 DEBARMENT BASED ON AFFILIATION.

Subpart 1. **Conviction of business imputed to person.** The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200 is imputed to any principal or other person associated with the business subject to debarment or suspension, who participated in, knew of, or had reason to know of the conduct.

Subp. 2. **Debarment.** A business must be debarred when it:

A. employs a former principal of a debarred or suspended business or person described in subpart 1 as an officer, director, manager, or in another significant decision-making capacity;

B. is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a principal or former principal of a debarred or suspended business; or

C. is a business in which a former principal of a debarred or suspended business has a significant financial interest and the former principal has the authority to or will control, direct, manage, or influence any activities of the business with respect to the Mn/DOT contract in question.

Subp. 3. **Procedure.** A business described in subpart 2 must be debarred after a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 4. **Duration.** The period of debarment must be the same as that of the debarred former principal or business.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3700 DEBARMENT LIMITATION.

A person may not be debarred for more than three years for conduct which gave rise to the grounds for debarment. If new or different grounds arise, a new debarment hearing must be held.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3800 EFFECTIVE DATE OF DEBARMENT.

A debarment takes effect on the date of the mailing of the order for debarment by the Minnesota Department of Transportation. The order for debarment must be sent by certified mail.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: 9 SR 1186

1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract to a debarred or suspended business when:

A. that business is the sole supplier of a material or service required by the Minnesota Department of Transportation;

B. the commissioner of transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3;

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section 16B.08, subdivision 6; or

D. the contract is for purchasing materials or renting equipment for routine road maintenance.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*

1230.4000 CONTINUATION OF CONTRACTS.

Mn/DOT contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*

1230.4100 PROHIBITIONS.

Subpart 1. **Mn/DOT contracts.** Except as provided in part 1230.3900, the Department of Transportation may not award a Mn/DOT contract to a debarred or suspended person and may not approve a contract under which a debarred or suspended person will serve as a subcontractor or material supplier.

Subp. 2. **Subcontracts and purchase of materials.** Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded by the Minnesota Department of Transportation may not subcontract with or purchase materials or services from a debarred or suspended person for performance of that contract.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*

1230.4200 SUSPENSION.

Subpart 1. **Order of suspension.** The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon receiving evidence of an affiliation described in part 1230.3600, subpart 2.

Subp. 2. **Commencement of proceedings.** The commissioner of transportation shall start debarment proceedings within ten days of the mailing of the suspension order.

Subp. 3. **Notice and content.** The order for suspension must describe the reason for suspension and must be sent by certified mail to the person suspended.

Subp. 4. **Effective date of suspension; term.** The order for suspension takes effect on the date the order is mailed. No suspension may exceed 60 days.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*

1230.4300 NOTICE TO PUBLIC.

Subpart 1. **Notice to commissioner.** The Minnesota Department of Transportation shall provide to the commissioner a copy of each suspension, debarment, or termination order on the same day that the order is mailed to the debarred or suspended person.

Subp. 2. **Publication.** The commissioner shall publish weekly, in the State Register, a list of debarred and suspended persons, the effective date of each suspension and debarment, and the term of each debarment. The commissioner shall also publish notice of debarment terminations under part 1230.3900 and the effective date of the termination.

Statutory Authority: *MS s 16B.04 subd 1; L 1984 c 654 art 2 s 8*

History: *9 SR 1186*