

## MINNESOTA RULES

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#### **BIDDING AND CONTRACTS**

##### **1230.0100 SCOPE.**

Pursuant to Minnesota Statutes, chapters 16B and 16C, parts 1230.0100 to 1230.1910 govern the procurement of materials and services for the state.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

**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. **Affiliation.** "Affiliation" has the meaning given in the Small Business Administration (SBA) regulations, Code of Federal Regulations, title 13, part 121.

A. Except as otherwise provided in Code of Federal Regulations, title 13, part 121, businesses are affiliates of each other when, either directly or indirectly:

- (1) one business controls or has the power to control the other; or
- (2) a third party or parties control or have the power to control both; or
- (3) an identity of interest between or among parties exists such that affiliation may be found.

B. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a business meets small business size criteria and the statutory cap on the participation of businesses in the Minnesota small business procurement program.

Subp. 2a. **Best value.** "Best value" describes a result intended in the acquisition of all goods and services unless otherwise provided for by law. Except as otherwise provided by law, price must be one of the evaluation criteria when acquiring goods and services. Other evaluation criteria may include, but are not limited to, environmental considerations, quality, and vendor performance.

Subp. 2b. **Bid.** "Bid" means an offer extended by a vendor in response to a request for bids.

Subp. 3. **Broker.** "Broker" means a business that does not take legal title to the product, does not add value to the product, and has no written authorization to represent the manufacturer of the product.

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. 4a. **Competitive bidding.** "Competitive bidding" means a process by which an award is made to the lowest responsible bidder meeting all terms, conditions, and specifications of the solicitation document.

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 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 from receiving solicitations, the award of a contract by a governmental body, or selling any products or services to state agencies 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 Office of State Procurement or a procurement manager with written delegation of authority from the director.

Subp. 9. **Division.** "Division" means Office of State Procurement, Department of Administration, Room 112, State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155 and its successor divisions.

Subp. 9a. **Dominant in its field of operation.** "Dominant in its field of operation" means exceeding the annual gross revenues or sales specified in Minnesota Statutes, section 16C.16, subdivision 2.

Subp. 10. **Franchise.** "Franchise" means an operating agreement obtained from a franchiser to conduct a business entity 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 parts 1230.1601 to 1230.1607.

Subp. 11. **Joint venture.** "Joint venture" means the temporary association of two or more businesses to secure and fulfill a contract. For contracts awarded 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 group, economically disadvantaged area, or veteran-owned 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 or material deviation.** "Material variance" or "material deviation" means a variance in a response from specifications or conditions that allows a responder a substantial advantage or benefit not enjoyed by all other responders or gives the state something significantly different from what the state requested in the solicitation document.

Subp. 15a. **NAICS or North American Industry Classification System.** "NAICS" or "North American Industry Classification System" is a system 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. 16. **Open market.** "Open market" means purchases made in the marketplace without the need for competitive solicitations.

Subp. 17. **Person.** "Person" means a natural person or a business and includes both if the natural person is engaged in a business.

Subp. 18. **Principal place of business.** "Principal place of business" means the business location where the individuals who manage the business's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the division shall determine the principal place of business.

Subp. 18a. **Proposal.** "Proposal" means an executed document submitted by a vendor in response to a request for proposals.

Subp. 19. **Reinstatement.** "Reinstatement" means a process by which a debarred vendor is restored to the state vendor list.

Subp. 19a. **Responder.** "Responder" means a person who provides an offer in response to a solicitation.

Subp. 20. **Responsible vendor.** "Responsible vendor" means a vendor 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 delinquent 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

E. 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

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

G. 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

H. 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

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

Subp. 20a. **Small Business Administration.** "Small Business Administration" or "SBA" means the United States Small Business Administration.

Subp. 21. [Repealed, 42 SR 543]

Subp. 21a. **Solicitation.** "Solicitation" means a request for bids or a request for proposals.

Subp. 22. **Suspension.** "Suspension" means to be temporarily suspended by the director of the Office of State Procurement from receiving solicitations, the award of a contract, or selling any products or services to state agencies while the director determines if there is probable cause for debarment.

Subp. 23. **Targeted group business.** "Targeted group business" or "TG" means certified businesses designated by the commissioner of administration that are at least 51 percent owned and operated by women, persons with substantial physical disabilities, or specific minorities who provide goods, products, or services within purchasing categories designated by the commissioner.

Subp. 24. **Terms governing socially and economically disadvantaged persons.** The terms in items A to D have the meanings given them for purposes of administering the small business procurement program of which members are rebuttably presumed to be socially and economically disadvantaged.

A. "Racial minority" means an individual in one or more of the categories in subitems (1) to (9).

(1) "Alaska Native" means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlakatla Indian community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom an Alaska Native village or Alaska Native group regards as an Alaska Native if the citizen's father or mother is regarded as an Alaska Native.

(2) "Black American" means an individual whose origin is any of the Black racial groups of Africa.

(3) "Hispanic American" means an individual of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.

(4) "Native American" means an individual who is an enrolled member of a federally or state-recognized Indian tribe, Alaska Native, or Native Hawaiian.

(5) "Asian-Pacific American" means an individual whose origin is from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the United States Trust Territories of the Pacific Islands (the Republic of Palau), the Republic of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, the Federated States of Micronesia, or Hong Kong.

(6) "Subcontinent Asian American" means an individual whose origin is from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka.

(7) "Native Hawaiian" means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the state of Hawaii.

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native corporation, that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the state in which the tribe, band, nation, group, or community resides.

(9) "Tribally owned business" means any business at least 51 percent owned by an Indian tribe.

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

C. "Substantial physical disability" means with respect to an individual:

(1) a physical impairment that substantially limits one or more major life activities;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.

D. This subpart includes any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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 and economically disadvantaged, economically disadvantaged area, or veteran-owned business.** "Small business eligible for certification as socially and economically disadvantaged, economically disadvantaged area, or veteran-owned 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 at least 51 percent owned and is operationally controlled on a

day-to-day basis by citizens or lawfully admitted permanent residents of the United States. Certified rehabilitation facilities and extended employment providers need not be organized for profit to be eligible for certification.

Subp. 26a. **Socially and economically disadvantaged individual.** "Socially and economically disadvantaged individual" means any individual who is a citizen, or lawfully admitted permanent resident of the United States, and who has been subjected to racial or ethnic prejudice or cultural bias because of the individual's identity as a member of a group or groups and without regard to the individual's own qualities. The disadvantage must stem from circumstances beyond the individual's control.

A. Any individual the commissioner finds to be a socially and economically disadvantaged individual is on a case-by-case basis. An individual must demonstrate that the individual has identified as a member of a designated group under subpart 24.

B. Being born in a particular country is not the only criteria used to determine that an individual is a member of one of the groups listed in subpart 24.

Subp. 27. **Vendor.** "Vendor" means a natural person or a business and includes both if the natural person is engaged in a business.

Subp. 28. **Veteran-owned business.** "Veteran-owned business" or "VO" means a for-profit business:

A. that is at least 51 percent owned by one or more veterans as defined in Minnesota Statutes, section 16C.16, or in the case of a corporation in which 51 percent of the stock is owned by one or more such individuals; and

B. whose management and daily business operations are controlled by one or more of the veterans who own it.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

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**1230.0200** [Repealed, 16 SR 194]

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### **1230.0300 SOLICITING RESPONSES.**

Subpart 1. **Publication.** Notice of solicitations estimated to exceed the limits established by Minnesota Statutes, section 16C.06, subdivision 1, must be advertised at least seven calendar days prior to the opening date. Responses must also be solicited by announcing solicitations to prospective responders registered with the division pursuant to subpart 3.

Subp. 2. [Repealed, 28 SR 499]

Subp. 3. **Vendor list.** A record of potential responders must 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 must be placed on appropriate lists to receive solicitations. The name of a vendor who fails to respond to three consecutive solicitations may be removed from the vendor list. 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; 16C.03; 16C.16; 16C.19*

**History:** *11 SR 1784; 16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.0400 ADVERTISED SOLICITATIONS.**

Subpart 1. [Repealed, 16 SR 194]

Subp. 2. **Solicitation conditions.** General terms and conditions applicable to all state purchases must be stated in the standard solicitation document. Special terms and conditions applicable to specific commodities or types of purchase must also be stated in the solicitation document. In the event of conflict between general terms and conditions and special terms and conditions, the special terms and conditions will govern.

Subp. 3. [Repealed, 16 SR 194]

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.0500 SECURITY.**

Subpart 1. **Payment.** Each solicitation must set forth the security required by the division, if any. The security may be a bid bond or a security check, such as a certified check, cashier's check, or money order, made payable to "State of Minnesota" and must be made upon the condition or guarantee that in the event the responder's offer is accepted, the responder must enter into a contract in accordance with the solicitation. Solicitations may stipulate that a security check may also be held as supply security for delivery or acceptance of merchandise, or satisfactory completion of the contract. A successful responder may substitute a supply bond or an irrevocable letter of credit from a bank for a security check.

Subp. 2. **Forfeit.** Bid bonds or security checks of successful responders constitute liquidated damages for failure of a responder to enter into a contract. Security checks of successful responders that are held as supply security constitute liquidated damages for failure of the successful responder to make delivery, to have merchandise accepted, or to satisfactorily complete the contract.

Subp. 3. **Return.** Security checks of unsuccessful responders must be returned to the responder by placing them in the mail within five working days after an award is made. Security checks of successful responders must be returned upon receipt of required supply bond or payment and performance bonds. Security checks of successful responders that are held as supply security must

be returned within five working days after delivery is completed and notification to the division that acceptance is made by the agency, or the contract is satisfactorily completed. No interest may be paid on any money held as security.

Subp. 4. [Repealed, 28 SR 499]

Subp. 5. [Repealed, 28 SR 499]

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.0600 RESPONDER ERRORS.**

Prior to the date and time responses are due, any person may withdraw a response or any part of a bid by notifying the director in writing of the desire to withdraw, by appearing in person at the division office and withdrawing the response, or by an electronic writing or facsimile received by the director requesting withdrawal of the response.

Subsequent to the date and time responses are due, a person may withdraw a response or any part of a bid only upon a showing that an obvious error exists in the response. The showing and request for withdrawal must be made in writing to the director within a reasonable time after the opening of the responses and prior to the state's detrimental reliance on the response.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.0700 RECEIPT AND OPENING OF RESPONSES.**

Subpart 1. **Treatment of responses to solicitations.** Upon receipt, all bids and proposals must be time stamped, showing the date and hour received. Responses must be opened publicly and read aloud in accordance with Minnesota Statutes, section 13.591, subdivision 3, at the time and place established in the solicitation. Bids and proposals received after the time set for the opening must not be opened or considered. Written notification of a late response must be provided to the responding vendor. The division must, at the vendor's request, return the unopened response to the vendor at the vendor's expense if the request is made within ten working days of the opening.

Subp. 2. [Repealed, 16 SR 194]

Subp. 3. **Rejection of responses.** The state may reject any or all responses or portions thereof. Responses must be rejected for good and sufficient cause, including but not limited to, abandonment of the project by the state, insufficient state funds, correction of a process error, disclosure or discovery of an organizational conflict of interest, or a determination that the responder is not a responsible vendor. A vendor whose response is rejected must be given notice of the rejection and the reason(s) for rejection of the response.

Subp. 4. **Informalities and minor deficiencies.** The state reserves the right to waive minor deficiencies or informalities in responses. Minor informalities must be waived if, in the judgment of the director, or delegate, the best interest of the state would be served without prejudice to the rights of the other responders. 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; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.0750 ORGANIZATIONAL CONFLICTS OF INTEREST.**

Subpart 1. **Disclosure requirements.** A vendor who is aware of an actual or potential conflict of interest as defined in Minnesota Statutes, section 16C.02, subdivision 10a, prior to the submission of a response to a solicitation or who becomes aware of an actual or potential conflict of interest during the term of a contract shall disclose the following information to the director of the division:

- A. the identity of the parties involved in the actual or potential conflict;
- B. the facts that give rise to the actual or potential conflict; and
- C. any measures the vendor proposes to avoid, mitigate, or neutralize the conflict if possible.

Subp. 2. **Cooperation required.** In the event an actual or potential organizational conflict of interest is identified with respect to a pending or existing contract, the vendor shall cooperate with the director to explore potential measures to avoid, mitigate, or neutralize the conflict. These measures include, but are not limited to, amending the scope of work to exclude the tasks that give rise to the conflict or disclosing information for distribution to other responding vendors.

Subp. 3. **Remedies.** If an organizational conflict of interest for a particular contract cannot reasonably be avoided, mitigated, or neutralized, a vendor may be disqualified from participation in the solicitation process for that contract. If the conflict is identified after the contract has become effective, the contract is subject to immediate cancellation. Pursuant to Minnesota Statutes, section 16C.04, subdivision 3, paragraph (b), the commissioner may waive the requirement to avoid, mitigate, or neutralize an organizational conflict of interest if vital operations of the state will be jeopardized. Vital operations include contracts relating to public health, welfare or safety, or contracts that are necessary to avoid a disruption in essential state functions.

Subp. 4. **Public data.** Data generated under this part becomes public in accordance with Minnesota Statutes, section 13.591.

**Statutory Authority:** *MS s 16B.04; 16C.03; 16C.16; 16C.19*

**History:** *28 SR 499*

**Published Electronically:** *January 14, 2005*

**1230.0800 AWARD OF CONTRACTS.**

Award of contracts must be made in conformity with Minnesota Statutes and with no material variance from the terms and conditions of the solicitation document. Unless otherwise provided for by law, awards for all acquisitions, except building and construction contracts, must be based on best value. Building and construction contracts must be awarded in accordance with Minnesota Statutes, sections 16C.25 to 16C.29.

**Statutory Authority:** *MS s 16B.04; 16C.03; 16C.16; 16C.19*

**History:** *28 SR 499*

**Published Electronically:** *January 14, 2005*

**1230.0900 TIED BIDS.**

Subpart 1. **Resolving tied bids.** Tied low bids for less than \$2,500 must be resolved by a coin toss among the tied low bidders, except as provided in subpart 2.

Except as provided in subpart 2, tied low bids for \$2,500 or more must be referred to the director for disposition. The methods used to resolve tie bids may include requesting second pricing from the vendors or negotiating with the tied low bidders.

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; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

**1230.1000 CONTRACT PERFORMANCE.**

Subpart 1. **Shipment.** The director or authorized agents of state agencies shall place orders with successful responders using official state contract documents. Upon award, shipment must be made in accordance with delivery instructions in the ordering document.

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

Subp. 3. **Grounds for rejection.** All deliveries must conform to all terms, conditions, and specifications of the solicitation. Failure in this respect is cause for rejection of the goods. Goods 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 must 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, must be given by the receiving agency to both vendor and the

carrier (if f.o.b. shipping point) within a reasonable time after delivery, with a copy of this notice to the division. A revocation of acceptance for latent deficiencies that would make the goods unsatisfactory for the purpose intended must be given by the state within reasonable time after discovery. The contractor shall satisfactorily repair or replace such goods within a reasonable time.

Subp. 5. **Removal of rejected goods.** The vendor shall remove at the vendor's expense any goods rejected by the state. If the vendor fails to remove the goods and instead forwards shipping instructions to the agency concerned, the state need not comply, but may sell the goods 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 goods.** If the needs of a state agency do not permit time to replace rejected goods, 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 goods of the nature required. The vendor shall be liable for all additional costs and expenses.

Subp. 7. **Adjusting price of nonconforming goods.** If it is determined that goods do 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 that part of the order when it is determined by the director to be in the best interest of the state.

Subp. 8. **Laboratory tests.** The director may require that a laboratory analysis or other tests be made to determine the acceptability of the delivered goods and to ensure that those goods meet specifications. When analyses or tests are required, acceptance by the state must not occur nor be deemed to have been made until testing is completed and affirmative results are obtained. Any discount time applicable begins after affirmative results are obtained. Vendors must be notified of unsatisfactory test results. Unless provisions for laboratory analysis or tests are contained within the solicitation document, costs incurred for them must be paid by the state.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

## **1230.1100 FAILURE TO PERFORM.**

Subpart 1. **Penalties.** If a responder who is awarded a contract fails to perform as specified, the security as described in part 1230.0500, subpart 1, must be retained by the state as liquidated damages. The vendor may also be determined not to be a responsible vendor and may be subject to suspension or debarment pursuant to part 1230.1150. The state may also pursue all other remedies permitted by rule or provided by law.

If the security is in the form of a bond, the bonding company must 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 vendor regardless of whether 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 vendor and may be subject to suspension or debarment pursuant to part 1230.1150.

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 contract requirements.** A vendor must be held in default for failure to conform to contract requirements, solicitation terms, conditions, and 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; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 17 SR 1279; L 2003 c 112 art 2 s 50; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **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 eligibility to receive solicitations, the award of contracts, or selling any products or services to state agencies if the director determines that the person has engaged in an activity that might lead to debarment. A suspension must not exceed six months unless the vendor is proposed for debarment by the federal government and in that event, the suspension must not exceed the length of time necessary for the federal government to issue a final order.

Subp. 2. **Debarment causes.**

- A. A person shall be debarred if one or more of the following occurs:
  - (1) 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;
  - (2) 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 affects responsibility as a state vendor;
  - (3) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

(4) violation of contract provisions, as set forth in units (a) and (b), of a character that is regarded by the director to be so serious as to justify debarment action:

(a) failure without good cause to perform according to the specifications, time limits, or any terms or conditions in the contract; or

(b) a record of failure to perform, or of unsatisfactory performance, according to the terms of one or more contracts or as measured by standard commercial practices; provided that this failure to perform or unsatisfactory performance was not caused by acts beyond the control of the contractor; or

(5) any other cause the director determines to be serious and compelling including, but not limited to, threatening, abusive, or intimidating behavior; collusion with other vendors to restrain competition; giving false information on a vendor's registration application or response to a solicitation; violating terms of suspension; and all acts that would disqualify the person as a responsible vendor, as defined in part 1230.0150, subpart 20, including debarment by another governmental entity.

B. The following must occur in cases in which a vendor is debarred by other governmental entities:

(1) Any vendor debarred by the federal government, the state of Minnesota, or any of its departments, commissions, agencies, or political subdivisions, is automatically debarred by the division under the same terms and limits of the original debarment.

(2) If the vendor is debarred by any other governmental entities, it is 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 of debarment or suspension must be furnished to the affected parties and must:

A. state the reasons for the action taken;

B. give the length of time the vendor will be debarred or suspended; 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 calendar days of receipt of a decision to suspend or debar. The commissioner shall, within 45 calendar 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 vendor may be debarred from receiving solicitations and submitting responses for not less than one year, nor more than three years unless a longer time is in effect under subpart 2, item B, subitem (1). The length of the debarment must 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 and suspended.** The division shall maintain a master list of all suspensions and debarments. The master list must retain all information concerning suspensions and debarments as a public record. The records must be maintained for at least three years following the end of a suspension or debarment. Such public information may be considered in responsible vendor determinations according to part 1230.0150, subpart 20.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.1175 REINSTATEMENT AND PROBATION.**

Subpart 1. **Review of reinstatement applications.** The director shall 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 vendor, 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; and

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 shall determine if the person can be reinstated as a responsible vendor and be added to the vendor list. If, after investigation, the applicant's request for reinstatement is denied, the person cannot reapply for reinstatement for one year from the date of denial. If reinstated, the applicant must be placed on the vendor 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 vendors.

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



During the probationary period, the party on probation must respond to all solicitations received from the division. An indication of an intent not to respond is considered a response for purposes of this subpart.

If a response 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 must be deemed not to be a responsible vendor and must be permanently removed from the vendor list.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.1180 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.**

The commissioner may terminate a debarment by order or may award a contract to a debarred or suspended vendor when:

- A. the vendor is the sole supplier of a material or service required by the state;
- B. the commissioner determines that an emergency exists as defined in Minnesota Statutes, section 16C.10, subdivision 2; or
- C. the commissioner determines that the vendor's ineligibility would cause the state undue hardship.

**Statutory Authority:** *MS s 16B.04; 16C.03; 16C.16; 16C.19*

**History:** *28 SR 499*

**Published Electronically:** *January 14, 2005*

### **1230.1200 CONTRACT CANCELLATION.**

The director may cancel a purchase or contract under any one of the following conditions including, but not limited to:

- A. the vendor agrees to the cancellation;
- B. the vendor 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 conform to contract requirements or standard commercial practices including, but not limited to, all instances of failure to perform in part 1230.1100, subpart 3;
- D. the existence of an organizational conflict of interest is identified; or
- E. funds are not appropriated or an appropriation is discontinued by the legislature for the acquisition.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** 16 SR 194; 28 SR 499

**Published Electronically:** January 14, 2005

### **1230.1300 REHABILITATION FACILITY.**

Any rehabilitation facility wishing to apply to receive notice of available solicitations shall apply in writing to the director of the Minnesota Association of Community Rehabilitation Organizations.

**Statutory Authority:** MS s 16B.04; 16C.03; 16C.16; 16C.19

**History:** L 1988 c 689 art 2 s 268; 28 SR 499

**Published Electronically:** January 14, 2005

## **SMALL BUSINESS PROCUREMENT PROGRAM**

### **1230.1400 PURPOSE.**

Parts 1230.1400 to 1230.1910 are adopted pursuant to Minnesota Statutes, sections 16C.16 to 16C.21, for the purpose of governing procurement procedures relating to the programs for small businesses and socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small businesses. These programs are administered by the Office of State Procurement, Department of Administration, 50 Sherburne Avenue, Saint Paul, Minnesota 55155.

**Statutory Authority:** MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19

**History:** 16 SR 194; 28 SR 499; 42 SR 543

**Published Electronically:** November 13, 2017

### **1230.1450 SCOPE.**

In the event of irreconcilable conflict between the general procurement rules in parts 1230.0100 to 1230.1300 and 1230.1400 to 1230.1910, parts 1230.1400 to 1230.1910 shall govern. The definitions contained in part 1230.0150 apply in the administration of these programs.

**Statutory Authority:** MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19

**History:** 16 SR 194; 28 SR 499; 42 SR 543

**Published Electronically:** November 13, 2017

### **1230.1500** [Repealed, 16 SR 194]

**Published Electronically:** January 14, 2005

### **1230.1600 ELIGIBILITY FOR SOCIALLY AND ECONOMICALLY DISADVANTAGED, ECONOMICALLY DISADVANTAGED AREA, OR VETERAN-OWNED SMALL BUSINESS PROGRAM.**

Subpart 1. **Eligible businesses.** The following businesses are eligible for participation in the socially and economically disadvantaged, economically disadvantaged area, or veteran-owned

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 and economically disadvantaged, economically disadvantaged area, or veteran-owned small business program: brokers, third-party lessors, and franchises.

Subp. 3. [Repealed, 42 SR 543]

Subp. 4. **Definitions.** For purposes of parts 1230.1600 to 1230.1910, the following definitions apply.

A. "Assets" mean all the property of a person available for paying debts or for distribution, including the person's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, individual retirement accounts or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

B. "Contingent liability" means a liability that depends on the occurrences of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant business, legal claims and judgments, and provisions for federal income tax.

C. "Immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under Minnesota law.

D. "Liabilities" mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to a bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

E. "Minnesota small business procurement program" or "program" refers to the programs described in parts 1230.1400 to 1230.1910.

F. "Personal net worth" means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or participating socially and economically disadvantaged or economically disadvantaged area small business or the individual's equity in the individual's primary place of residence. An individual's personal net worth includes only the individual's share of assets held jointly or as community property with the individual's spouse.

G. "Primary industry classification" means the most current NAICS designation as specified in the United States North American Industry Classification System Manual that best describes the primary enterprise of a business.

H. "Spouse" means a married person, including a person in a domestic partnership or a civil union recognized under Minnesota law.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1601 CERTIFICATION STANDARDS; BURDENS OF PROOF.**

A. In determining whether to certify a business as eligible to participate as a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business, the standards in this part apply.

B. The business seeking certification has the burden of demonstrating, by a preponderance of evidence, that it meets the requirements in parts 1230.1601 to 1230.1607.

C. Members of the designated groups identified in part 1230.1603, subpart 1, item A, are deemed to be socially and economically disadvantaged. In order to obtain the benefit of the determination, individuals must submit a signed, notarized statement that they are a member of one of the groups in part 1230.1603, subpart 1, item A. Applicants must provide the division information concerning their economic disadvantage status as required in part 1230.1603, subpart 1, item B.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1602 GROUP MEMBERSHIP DETERMINATIONS.**

A. If, after reviewing the signed, notarized statement of membership in a socially and economically disadvantaged group as described in part 1230.1601, item C, the individual's claim of membership in that group is questionable, the division may require that the individual submit additional evidence that the individual is a member of the group.

B. In making such a determination, the division must consider whether the person has identified as a member of the group over a significant period of time prior to applying for certification and whether the person is regarded as a member of the group by the relevant community. The division may require the applicant to produce appropriate documentation of group membership.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1603 SOCIAL AND ECONOMIC DISADVANTAGE.****Subpart 1. Presumption of disadvantage.**

A. Citizens of the United States or lawfully admitted permanent residents who are women, persons with substantial physical disabilities, Native Americans, Black Americans, Hispanic Americans, Asian-Pacific Americans, subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA are deemed to be socially and economically disadvantaged individuals. Applicants must submit a signed, notarized certification that each deemed disadvantaged owner is, in fact, socially and economically disadvantaged.

B. (1) Each individual owner of a business applying to participate as a socially and economically disadvantaged or economically disadvantaged area small business whose ownership and control are relied upon for certification must certify that the individual has a personal net worth that does not exceed the limit in Code of Federal Regulations, title 49, subtitle A, part 26.

(2) This certification must be supported with a signed, notarized statement of personal net worth on a form specified by the division, with appropriate supporting documentation. Where necessary to accurately determine an individual's personal net worth, on a case-by-case basis, additional financial information may be required from the owner of an applicant business including, but not limited to, information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company.

(3) In determining an individual's net worth, the following requirements apply:

(a) an individual's ownership interest in the applicant business is excluded;

(b) an individual's equity in the individual's primary residence, except any portion of the equity that is attributable to excessive withdrawals from the applicant business, is excluded. The equity is the market value of the residence less any mortgages and home equity loan balances. Home equity loan balances must be included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes;

(c) a contingent liability may not be used to reduce an individual's net worth; and

(d) with respect to assets held in vested pension plans, individual retirement accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, only the present value of the assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time, is included.

(4) Upon certification, an individual's personal net worth and any documents pertaining to it including but not limited to financial statements and federal tax returns must be returned to the individual or destroyed by the division.

Subp. 2. **Rebuttal of presumption of disadvantage.** An individual's presumption of economic disadvantage may be rebutted in two ways.

A. If the standard of personal net worth and supporting documentation that an individual submits under subpart 1, item B, shows that the individual's personal net worth exceeds the limit in Code of Federal Regulations, title 49, subtitle A, part 26, the individual's determination of economic disadvantage is rebutted.

For example, an individual with very high assets and significant liabilities may, in accounting terms, have a personal net worth of less than the limit in Code of Federal Regulations, title 49, subtitle A, part 26. However, the person's assets collectively, including high income level, an expensive house, a yacht, and extensive real or personal property holdings, may lead a reasonable

person to conclude that the individual is not economically disadvantaged. The individual's determination of economic disadvantage may be rebutted under these circumstances, as provided in this subpart, even though the individual's personal net worth is less than the limit in Code of Federal Regulations, title 49, subtitle A, part 26.

B. If the statement of personal net worth and supporting documentation an individual submits under subpart 1, item B, demonstrates that the individual is able to accumulate substantial wealth, the individual's determination of economic disadvantage is rebutted. Factors that may be considered in making this determination include, but are not limited to, the following:

- (1) whether the average adjusted gross income of the owner over the most recent three-year period exceeds the limit in Code of Federal Regulations, title 49, subtitle A, part 26;
- (2) whether the income was unusual and not likely to occur in the future;
- (3) whether the earnings were offset by losses;
- (4) whether the income was reinvested in the business or used to pay taxes arising in the normal course of operations by the business;
- (5) other evidence that income does not indicate a lack of economic disadvantage; and
- (6) whether the total fair market value of the owner's assets exceeds the limit in Code of Federal Regulations, title 49, subtitle A, part 26.

**Subp. 3. Transfers within two years.**

A. Except as set forth in item B, any assets that an individual has transferred to an immediate family member, to a trust that has a beneficiary who is an immediate family member, or to the applicant business for less than fair market value, within two years prior to a business's application for participation in the socially and economically disadvantaged or economically disadvantaged area small business program or within two years of the business's certification, will be attributed to the individual claiming disadvantaged status, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

B. Any assets transferred by an individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements, will not be attributed to the individual claiming disadvantaged status.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1604 OWNERSHIP.**

Subpart 1. **Determination of ownership.** In determining whether the qualifying participants in a business own the business, all the facts in the record will be viewed as a whole, including the origin of all assets and how and when they were used in obtaining the business. All transactions

for the establishment and ownership, or transfer of ownership, must be in the normal course of business, reflecting commercial and arms-length practices.

**Subp. 2. Eligibility.**

A. To be an eligible socially and economically disadvantaged or veteran-owned small business, a business must be at least 51 percent owned by socially and economically disadvantaged individuals or veterans, respectively.

(1) In the case of a corporation, socially and economically disadvantaged individuals or veterans, respectively, must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals or veterans, respectively. The ownership must be reflected in the business partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals or veterans, respectively.

B. To be an eligible economically disadvantaged area business, if the business is not located in an economically disadvantaged area, the business must be at least 51 percent owned by individuals who reside in an economically disadvantaged area.

**Subp. 3. Proof of contribution.**

A. The business's ownership by qualifying individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the business as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

B. Insufficient contributions include a promise to contribute capital, an unsecured note payable to the business or an owner who is not a qualifying individual, mere participation in a business's activities as an employee, or capitalization not commensurate with the value of the business.

C. The qualifying owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a nonqualifying individual or business a priority or superior right to a business's profits, compared to the qualifying owner or owners, are grounds for denial.

D. Debt instruments from financial institutions or other organizations that lend funds in the normal course of business do not render a business ineligible, even if the debtor's ownership interest is security for the loan. For example:

(1) if an individual pays \$100 to acquire a majority interest in a business worth \$1,000,000, the individual's contribution to capital would not be viewed as substantial;

(2) if a 51 percent qualifying owner and a nonqualifying 49 percent owner contribute \$100 and \$10,000, respectively, to acquire a business grossing \$1,000,000, this may be indicative of a pro forma arrangement that does not meet the requirements of item A; and

(3) if a qualifying owner of an applicant business spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan, this type of contribution is not of a continuing nature.

Subp. 4. **Securities and assets.** All securities that constitute ownership of a business shall be held directly by a qualifying owner. Except as provided in this subpart, no securities or assets held in trust, or by any guardian for a minor, are considered as held by a qualifying individual in determining the ownership of a business. However, securities or assets held in trust are regarded as held by a qualifying individual for purposes of determining ownership of the business if:

A. the beneficial owner of securities or assets held in trust is a qualifying individual, and the trustee is the same or another such individual; or

B. the beneficial owner of a trust is a qualifying individual who, rather than the trustee, exercises effective control over management and policy making or daily operational activities of the business. Assets held in a revocable living trust may be counted only in the situation where the same qualifying individual is the sole grantor, beneficiary, and trustee.

Subp. 5. **Contributions.** The contributions of capital or expertise by the qualifying individuals to acquire ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the business or an owner who is not a qualifying individual, or mere participation in a business's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of business do not render a business ineligible, even if the debtor's ownership interest is security for the loan.

Subp. 6. **Contribution requirements.** The following requirements apply to situations in which expertise is relied on as part of a qualifying individual's contribution to acquire ownership.

A. The owner's expertise must be:

- (1) in a specialized field;
- (2) of outstanding quality;
- (3) in areas critical to the business's operations;
- (4) indispensable to the business's potential success;
- (5) specific to the type of work the business performs; and

(6) documented in the records of the business. These records must clearly show the contribution of the owner's expertise and its value to the business.



B. The individual whose expertise is relied upon must have a significant financial investment in the business.

Subp. 7. **Business interests or other assets.** For purposes of determining ownership, all interests in a business or other assets obtained by the individual under the following circumstances will be deemed as held by a qualifying individual:

A. as the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this part; or

B. through inheritance, or otherwise upon the death of the former owner.

Subp. 8. **Gift or transfer interest.**

A. For purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, are not held by a qualifying individual if they were obtained from any nonqualifying individual or nonqualifying business that is:

(1) involved in the same business for which the individual is seeking certification, or an affiliate of that business; or

(2) engaged in an ongoing business relationship with the business, or an affiliate of the business, for which the individual is seeking certification.

B. To overcome this determination and permit the interests or assets to be counted, the qualifying individual must demonstrate, by clear and convincing evidence, that:

(1) the gift or transfer to the qualifying individual was made for reasons other than obtaining certification; and

(2) the qualifying individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nonqualifying individual who provided the gift or transfer.

Subp. 9. **Marital assets.** The division must apply the following rules in situations in which marital assets form a basis for ownership of a business.

A. When marital assets, other than the assets of the business in question, held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the ownership interest in the business is deemed to have been acquired by that spouse with the spouse's own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the business is domiciled. A greater portion of joint or community property assets will not be counted toward ownership than state law would recognize as belonging to the qualifying owner or the applicant business.

B. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned business or community assets used to acquire an ownership interest in the business must be included as part of the business's application for certification.

Subp. 10. **Factors used to determine ownership.** The following factors shall be considered in determining the ownership of a business. A contribution of capital is not regarded as failing to be real and substantial, and a business shall not be found ineligible, solely because:

A. a qualifying individual acquired the individual's ownership interest as the result of a gift, or transfer without adequate consideration, other than the types specified in subpart 8;

B. there is a provision for the cosignature of a nonqualifying spouse on financing agreements, contracts for the purchase or sale of real personal property, bank signature cards, or other documents; or

C. ownership of the business in question or its assets is transferred for adequate consideration from a nonqualifying spouse to a qualifying spouse. In this case, particularly close and careful scrutiny shall be given to the ownership and control of a business to ensure that it is owned and controlled, in substance as well as in form, by a qualifying individual.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

### **1230.1605 OPERATING CONTROL.**

A. In determining whether qualifying owners control a business, all the facts in the record will be considered and viewed as a whole.

B. Only an independent business may be certified as a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business. An independent business is one in which the viability does not depend on its relationship with another business or businesses.

(1) In determining whether a potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business is an independent business, the relationships with nonqualifying businesses in areas as personnel, facilities, equipment, financial and bonding support, and other resources, shall be scrutinized.

(2) Present or recent employer-employee relationships between the qualifying owner or owners of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business and nonqualifying businesses or persons associated with nonqualifying businesses may be considered in determining whether these relationships compromise the independence of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business.

(3) The business's relationships with prime contractors shall be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the

independence of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business.

(4) In considering factors related to the independence of a potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business, the consistency of relationships between the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business and nonqualifying businesses with normal industry practice shall be considered.

C. A socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business must not be subject to any formal or informal restrictions that limit the customary discretion of qualifying owners. There must not be any restrictions through corporate charter provisions, bylaw provisions, contracts, or any other formal or informal devices including cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nonqualifying partners, conditions precedent or subsequent, executory agreements, voting trusts, or restrictions on or assignments of voting rights, that prevent qualifying owners, without the cooperation or vote of any nonqualifying individual, from making any business decision of the business. This item does not preclude a spousal cosignature on documents as provided for in part 1230.1604, subpart 10, item B.

D. The qualifying owners must possess the power to direct or cause the direction of the management and policies of the business and to make day-to-day as well as long-term decisions on matters of management, policy, and operations.

(1) A qualifying owner must hold the chief executive officer, president, or highest-ranking officer position in the company.

(2) In a corporation, qualifying owners must control the board of directors.

(3) In a partnership, one or more qualifying owners must serve as general partners, with control over all partnership decisions.

E. Nonqualifying individuals or immediate family members may be involved in a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business as owners, managers, employees, stockholders, officers, and directors. These individuals must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.

F. The qualifying owners of the business may delegate various areas of management and policy making or daily operations of the business to other participants in the business, regardless of whether these participants are qualifying individuals. These delegations of authority must be revocable, and the qualifying owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the qualifying owners in the business's overall affairs must be such that it can be reasonably concluded that the qualifying owners actually exercise control over the business's operations, management, and policy.

G. The qualifying owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the business

is engaged and the business's operations. The qualifying owners are not required to have experience or expertise in every critical area of the business's operations, or to have greater experience or expertise in a given field than managers or key employees. The qualifying owners must have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business is insufficient to demonstrate control.

H. If Minnesota or local law requires the owners to have a particular license or other credential in order to own or control a certain type of business, then the qualifying individuals who own and control a potential socially and economically disadvantaged or veteran-owned small business of that type must possess the required license or credential. If Minnesota or local law does not require a license or credential to own or control a business, certification will not be denied solely on the grounds that the owner lacks the license or credential. However, the division may take into account the absence of the license or credential as one factor in determining whether the qualifying owners actually control the business.

I. (1) Differences in remuneration between the qualifying owners and other participants in the business may be considered in determining whether to certify a business as a socially and economically disadvantaged or veteran-owned small business. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations from the business for the differences. It may be determined that a business is controlled by its qualifying owner although that owner's remuneration is lower than that of some other participants in the business.

(2) In a case where a nonqualifying individual formerly controlled the business, and a qualifying individual now controls it, a difference between the remuneration of the former and current controller of the business may be considered as a factor in determining who controls the business, particularly when the nonqualifying individual remains involved with the business and continues to receive greater compensation than the qualifying individual.

J. In order to be viewed as controlling a business, a qualifying individual cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. Absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. An individual could be viewed as controlling a part-time business that operates only on evenings and weekends if the individual controls it all the time it is operating.

K. (1) A qualifying individual may control a business even though one or more of the individual's immediate family members who are nonqualifying individuals participate in the business as a manager, employee, or owner, or in another capacity. Except as otherwise provided in this item, a judgment about the control the qualifying owner must exercise in relation to other persons involved in the business must be made without regard as to whether or not the other persons are immediate family members.

(2) If the qualifying owners, as distinct from the family as a whole, cannot be determined to control the business, then the qualifying owners have failed to establish their burden of proof concerning control, even though they may participate significantly in the business's activities.

L. When a nonqualifying individual who may or may not be an immediate family member transfers ownership and control of a business to a qualifying individual, and the nonqualifying individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nonqualifying individual unless the qualifying individual now owning the business demonstrates, by clear and convincing evidence, that:

(1) the transfer of ownership and control of the business to the qualifying individual was made for reasons other than obtaining certification as a socially and economically disadvantaged or veteran-owned small business; and

(2) the qualifying individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nonqualifying individual who formerly owned and controlled the business.

M. In determining whether a business is controlled by qualifying owners, whether the business owns equipment necessary to perform its work will be considered. Where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business, the business may be determined to be controlled by qualifying individuals.

N. A business shall be granted certifications only for specific types of work in which qualifying owners have the ability to control the business. To become certified in an additional type of work, the business must demonstrate that its qualifying owners are able to control the business with respect to that type of work. The qualifying owner's control of the business in the additional type of work must be verified.

(1) The types of work a business can perform, whether on initial certification or when a new type of work is added, must be described in terms of the most specific available NAICS code for that type of work. Multiple NAICS codes may be assigned where appropriate. The plain meaning of NAICS code descriptions will be used in determining the scope of a business's certification.

(2) Businesses must carefully check to make sure that the NAICS codes cited in a certification are kept up to date and accurately reflect work that the business's owners can control. The business bears the burden of providing detailed company information to make an appropriate NAICS code designation.

(3) If a business believes that there is not a NAICS code that fully or clearly describes the types of work in which it is seeking to be certified, the business may request that the division, in the business's certification documentation, supplement the assigned NAICS codes with a clear, specific, and detailed narrative description of the type of work in which the business is certified.

O. A business operating under a franchise or license agreement may be certified if it meets the standards in this part and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, restraints relating to standardized quality, advertising,

accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license should not be considered, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

P. In order for a partnership to be controlled by qualifying individuals, any nonqualifying partners must not have the power without the specific written concurrence of the qualifying partner or partners to contractually bind the partnership or subject the partnership to contract or tort liability.

Q. The qualifying individuals controlling a business may use an employee leasing company. The use of such a company does not preclude the qualifying individuals from controlling their businesses if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

#### **1230.1606 OTHER RULES AFFECTING CERTIFICATION.**

A. (1) The eligibility of a business must be evaluated on the basis of present circumstances. A business must not be denied certification based solely on historical information indicating a lack of ownership or control of the business by qualifying individuals in the past if the business currently meets the ownership and control standards of parts 1230.1601 to 1230.1607.

(2) A business must not be denied certification solely on the basis that it is a newly formed business that has not completed projects or contracts at the time of its application, has not yet realized profits from activities, or has not demonstrated a potential for success. If the business meets the requirements in parts 1230.1601 to 1230.1607, the business is eligible for certification.

B. Certified socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small businesses and businesses seeking certification as socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small businesses shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is grounds for removal or denial of certification.

C. Except in the case of rehabilitation facilities and extended employment providers, only businesses organized for profit may be eligible.

D. An eligible socially and economically disadvantaged or veteran-owned small business must be owned by individuals who are socially and economically disadvantaged or by veterans, respectively. Except as provided in this item, a business that is not owned by such individuals, but instead is owned by another business, including a socially and economically disadvantaged or

veteran-owned small business, is not an eligible socially and economically disadvantaged or veteran-owned small business.

(1) If qualifying individuals own and control a business through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the subsidiary may be certified if it otherwise meets all the requirements in parts 1230.1601 to 1230.1607. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) A subsidiary may be certified only if there is cumulatively 51 percent ownership of the subsidiary by qualifying individuals. For example:

(a) if qualifying individuals own 100 percent of a holding company, which has a wholly owned subsidiary, the subsidiary may be certified if it meets all other requirements;

(b) if qualifying individuals own 100 percent of a holding company that owns 51 percent of a subsidiary, the subsidiary may be certified if all other requirements are met;

(c) if qualifying individuals own 80 percent of a holding company that owns 70 percent of a subsidiary, so that the cumulative ownership of the subsidiary by qualifying individuals is 56 percent (80 percent of the 70 percent), which is more than 51 percent, then the subsidiary may be certified if all other requirements are met;

(d) if unit (b) or (c) applies, but someone other than the qualifying owners of the parent or holding company controls the subsidiary, even though the subsidiary is owned by qualifying individuals through the holding or parent company, it cannot be certified because it fails to meet control requirements;

(e) if qualifying individuals own 60 percent of the holding company, that in turn owns 51 percent of a subsidiary, so that the cumulative ownership of the subsidiary by qualifying individuals is about 31 percent, which is less than 51 percent, then the subsidiary cannot be certified; or

(f) if the holding company, in addition to the subsidiary seeking certification, owns several other companies and the combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification, then under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

E. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a business is an independent business, owned and controlled by qualifying individuals.

F. Socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small businesses may not be required to be prequalified as a condition for certification.

G. A business that is owned by an Indian tribe rather than by Native Americans as individuals may be eligible for certification. Such a business must be controlled by qualifying individuals, as provided in parts 1230.1601 to 1230.1607.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

### **1230.1607 OTHERWISE DISADVANTAGED BUSINESSES.**

A. An individual business that is not a targeted group business but is owned by a socially and economically disadvantaged person, as defined in part 1230.0150, subpart 24, may be included as a targeted group business if the division determines that inclusion is necessary to remedy discrimination against the owner based on race, gender, or disability in attempting to operate a business that would provide goods or services to public agencies. The business must demonstrate that it 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:

- (1) long-term or working capital financing;
- (2) equipment, raw material, or supplier trade credit;
- (3) bonding and insurance; or
- (4) a proportionate share of the market for its goods and services.

B. In addition, for certification under item A, the information in this item 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. The applicant must identify the fiscal-year reporting system used and list in whole dollar amounts:

- (1) assets:
  - (a) all cash, marketplace securities, and other near-cash items, excluding sinking funds;
  - (b) all accounts from trade, less allowance for doubtful accounts;
  - (c) anything constituting inventory for the business;
  - (d) any other current assets, not including prepaid items;
  - (e) the total of all current assets shown in units (a) to (d);
  - (f) all property, plant, leasehold improvements, and equipment, less accumulated depreciation or depletion;
  - (g) intangible assets, including goodwill, trademarks, patents, catalogs, brands, copyrights, formulas, franchises, and mailing lists, less accumulated amortization;



- (h) prepaid items and any other noncurrent assets; and
  - (i) total of all items listed in units (a) to (h);
- (2) liabilities:
- (a) all short-term note obligations, including bank and commercial paper excluding trade notes payable;
  - (b) that portion of long-term obligations that is due within the next fiscal year;
  - (c) open accounts due to the trade;
  - (d) income taxes, including current portion of deferred taxes. Identify federal, state, and local income taxes in subtotals;
  - (e) all other current liabilities, including bank overdrafts and accrued expenses;
  - (f) total of all current liabilities listed in units (a) to (e);
  - (g) all senior debt, including bonds, debentures, bank debt, mortgages, deferred portions of long-term debt, and capital lease obligations;
  - (h) all deferred taxes. Identify federal, state, and local taxes in subtotals;
  - (i) any other noncurrent liabilities, including subordinated debt and liability reserves;
  - (j) difference between total liabilities and total assets, including minority interest;
- and
- (k) total liabilities and net worth: total of all items listed in units (a) to (j); and
- (3) income data:
- (a) gross sales less returns and discounts allowed, if any;
  - (b) net sales less cost of sales;
  - (c) all selling, general, and administrative expenses, including depreciation, excluding interest expense;
  - (d) gross profit less operating expenses;
  - (e) 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; and
  - (f) operating profit minus all other expenses (net).

C. If the business seeking certification under item A is a contractor, the information in item B must be submitted in all categories except as modified as follows:

- (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 units (a) to (d); and

(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 liabilities: total of current liabilities shown and as modified, changed, or added in units (a) to (c); and

(e) total liabilities and net worth: total of all items shown as modified, changed, or added in units (a) to (d); and

(3) income data, contract revenues: revenues recognized under percent of completion method, in place of net sales.

D. In separate schedules, all applicants applying under item B or C 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 A, subitem (1), 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 A, subitem (2), 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; and

(3) item A, subitem (3), 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.

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 A 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.

E. Denials of certification under this part are subject to appeal under part 1230.1700, subpart 6.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

### **1230.1608 PROCEDURES.**

A. Eligibility of businesses as socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small businesses must be determined consistent with the standards of parts 1230.1601 to 1230.1607.

B. The following documentation and information must be provided in determining whether a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business meets the standards of parts 1230.1601 to 1230.1607:

(1) documentation related to the legal structure, ownership, and control of the applicant business. This includes, but is not limited to, articles of incorporation; corporate bylaws or operating agreements; organizational, annual, and board or member meeting records; stock ledgers and certificates; and state-issued certificates of good standing;

(2) bonding and financial capacity of the business, lease and loan agreements, and bank account signature cards;

(3) the work history of the business, including contracts it has received, work it has completed, and payroll records;

(4) a statement from the business on the type of work it prefers to perform as part of the program and its preferred locations for performing the work, if any;

(5) a list of the equipment owned by or available to the business and the licenses the business and its key personnel possess to perform the work it seeks to do as part of the program;

(6) complete financial statements, federal income tax returns or requests for extensions filed by the business and its affiliates for the last three years. A complete return includes all forms, schedules, and statements filed with the IRS;

(7) an appropriate application form, as determined by the division;

(8) 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; and

(9) 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.

C. When seeking certification under any provision of item A, or any certification provision, the applicant shall provide all other relevant or supporting information requested by the division.

D. The applicant must attest to the accuracy and truthfulness of the information on the application form. This must be done either in the form of a signed, notarized affidavit or in the form of an unsworn declaration executed under penalty of law.

E. All information on the form must be reviewed prior to making a decision about the eligibility of the business. Clarification of information contained in the application may be requested at any time in the application process.

F. A certified business must inform the commissioner in writing of any change in circumstances affecting its ability to meet the requirements of parts 1230.1601 to 1230.1607 or any material change in the information provided in its application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) Supporting documentation describing in detail the nature of such changes must be attached.

(3) A signed, notarized notification must be provided within 30 days of the occurrence of the change. If the applicant fails to make timely notification of such a change, the applicant will be deemed to have failed to cooperate.

G. If an applicant for certification withdraws an application before a decision on the application has been issued, the applicant can resubmit the application at any time.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1609 DENIALS OF REQUESTS FOR CERTIFICATION.**

A. When a request to be certified as a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business is denied, a written explanation of the reasons for the denial must be provided to the applicant, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant on request.

B. When a business is denied certification, 12 months must lapse before the business may reapply for certification. The time period for reapplication begins to run on the date the explanation required by item A is received by the applicant. An applicant's appeal of the decision does not extend this period.

C. When an administratively final denial of certification is made concerning a business, the business may appeal the denial pursuant to part 1230.1700, subpart 6.

**Statutory Authority:** *MS s 16C.19*

**History:** *42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1700 CERTIFICATION OF ELIGIBILITY.**

Subpart 1. [Repealed, 42 SR 543]

Subp. 2. [Repealed, 16 SR 194]

Subp. 3. [Repealed, 16 SR 194]

Subp. 4. [Repealed, 28 SR 499]

Subp. 5. **Grounds for denying application.** An applicant must be notified in writing of the acceptance or denial of the application, within 60 calendar days of receipt of the application form and all supporting documents required by the division. An application must be denied 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 qualifying individuals;

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 vendor list or directory of certified businesses by operation of Minnesota Statutes, section 16C.19, paragraph (c), and part 1230.1850; and

I. the applicant's financial data profile does not fit within the parameters in subpart 5a, item C, when applying as an individual business under part 1230.1607.

**Subp. 5a. Criteria for determinations.**

A. In addition to the standards in parts 1230.1604 and 1230.1605, the following circumstances will be given special consideration in determining eligibility:

(1) newly formed businesses and businesses 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 business;

(2) any relationship between a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business and a nonqualifying business that has an interest, financial or otherwise, in the socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business will be carefully reviewed to determine if the interest conflicts with the ownership and day-to-day operating control requirements.

B. 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 Minnesota Statutes, section 16C.16, subdivision 2.

C. The following standards, along with supporting documentation, must be used in reaching a determination to certify an applicant under part 1230.1607:

(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: 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 Employment 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 part 1230.1607, 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 Employment 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.

D. Businesses seeking certification that operate in distinctly defined commodities, construction services, or product lines must be reviewed for certification under those distinctions. If the company operates in more than one classification, the review must 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 shall accept or request certification under the predominant category in its operation.

Subp. 6. **Appeal of denial of application.** After an applicant has received written notice of denial of the application for certification as a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business, the applicant may appeal the decision in writing to the commissioner of administration within 15 calendar days of receipt of the determination. The applicant has the burden of proof in establishing qualifications for certification. The commissioner shall, if time permits, refer the appeal to a panel designated by the commissioner, for a recommendation before reaching a final decision. 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 decision. The commissioner shall make a final decision in writing within 60 calendar days of receipt of the appeal. Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of the state.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; L 1994 c 483 s 1; L 2003 1Sp4 s 1; 28 SR 499; L 2005 c 112 art 2 s 41; 42 SR 543*

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**1230.1800** [Repealed, 16 SR 194]

**Published Electronically:** *January 14, 2005*

**1230.1805 PROCUREMENTS FROM SOCIALLY AND ECONOMICALLY DISADVANTAGED, ECONOMICALLY DISADVANTAGED AREA, AND VETERAN-OWNED SMALL BUSINESSES.**

Subpart 1. **Directory.** A directory of certified businesses must be established and maintained by the division for various commodity classes.

Subp. 2. **Manufacturers representatives.** Manufacturers representatives shall have written agreements with manufacturers or manufacturers' authorized distributors to sell the products of the



manufacturers in place and approved by the division at the time responses are due in order to be eligible for consideration for award under parts 1230.1810 to 1230.1830.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

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### **1230.1810 PROPORTIONAL UTILIZATION OF TARGETED GROUP, ECONOMICALLY DISADVANTAGED AREA, AND VETERAN-OWNED SMALL BUSINESSES.**

The division shall attempt to achieve utilization of targeted group, economically disadvantaged area, and veteran-owned small businesses in proportion to their representation in the state's market area. In so doing, the division may use either of the following purchasing methods for making awards to businesses designated by the commissioner as targeted group, economically disadvantaged area, or veteran-owned small businesses.

A. When it is likely that three responses will be obtained from certified targeted group, economically disadvantaged area, or veteran-owned small businesses, the solicitation may be set aside for responses only from those businesses.

(1) The division shall include a statement on the solicitation document informing all vendors that the solicitation is set aside for responses only from certified targeted group, economically disadvantaged area, or veteran-owned small businesses.

(2) The division shall reject any response from a business not certified as a targeted group, economically disadvantaged area, or veteran-owned small business.

(3) Where there are no responses or no acceptable responses, unsatisfactory responses, if any, must be recorded and the solicitation must be reissued.

B. A certified targeted group, economically disadvantaged area, or veteran-owned small business may be awarded up to a six percent preference in the amount offered over the lowest responsible offer from another vendor.

(1) The division shall include a statement on the solicitation document informing all vendors that certified targeted group, economically disadvantaged area, or veteran-owned small businesses will receive a preference in the amount offered and the amount of the preference to be awarded.

(2) Unless awarded pursuant to subitem (4), when the lowest acceptable response from a certified targeted group, economically disadvantaged area, or veteran-owned small business is within the specified percent of the lowest acceptable response from another vendor, award must be made to the lowest responsible certified targeted group, economically disadvantaged area, or veteran-owned small business.

(3) Unless awarded pursuant to subitem (4), when there is no acceptable response from a certified targeted group, economically disadvantaged area, or veteran-owned small business within

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

(4) In the event the state is using a solicitation method other than competitive bidding, including requests for proposals and bids awarded based on best value criteria, where price is not the only factor considered in making an award, the preference shall be applied as stated in the solicitation document.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

**Published Electronically:** *November 13, 2017*

### **1230.1820 REQUIRED SUBCONTRACTING FOR CONSTRUCTION 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 or professional or technical services to targeted group, economically disadvantaged area, or veteran-owned small businesses.

A. Goals for subcontracting will depend on the type of work involved, location of project, size of project, and the availability of certified, willing, and able targeted group, economically disadvantaged area, or veteran-owned 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, economically disadvantaged area, or veteran-owned small business may exceed the 25 percent limitation if the awarded subcontract is to another targeted group, economically disadvantaged area, or veteran-owned small business certified under the same eligibility criteria.

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

A. The prime contractor may request a waiver for some or all specialties based on a documented unsuccessful effort to obtain certified targeted group, economically disadvantaged area, or veteran-owned subcontractors. The request for waiver must be accompanied by documentation showing the effort and steps taken to secure certified targeted group, economically disadvantaged area, or veteran-owned subcontractors.

B. A prime contractor may request a waiver for a specific specialty if a certified targeted group, economically disadvantaged area, or veteran-owned subcontractor cannot or will not fulfill a subcontract and no suitable alternative subcontractor is available so as to prevent significant project delay.

Subp. 4. **Incentives and penalties.** Solicitation documents must state whether or not the incentive rule applies for the project being solicited. If so:

A. Prime contractors who exceed the established goal on a given project for use of certified targeted group, economically disadvantaged area, or veteran-owned subcontractors by more than three percent may be awarded a financial incentive over and above the awarded project 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, economically disadvantaged area, or veteran-owned 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, economically disadvantaged area, or veteran-owned 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, economically disadvantaged area, or veteran-owned 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, economically disadvantaged area, or veteran-owned 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. Any person receiving an adverse decision from the commissioner may appeal in any appropriate court in this state.

C. If required in a solicitation, prime contractors who fail to meet the project goal without waiver for a project to be awarded and are the apparent low responder shall have a penalty of up to six percent, not to exceed \$60,000, added to their total price when other prime contractors have submitted responses that meet the specified subcontracting goal. The penalty to be added must be proportionate to the underuse determined in the response as compared to the announced project goal.

D. The formula to be utilized in the application of this subpart is: Penalty (to be added to the response) = maximum penalty x (underuse ÷ project goal).

E. The division may cancel solicitations and resolicit the project when no responses meet the announced goal and the evidence available to the division indicated sufficient responsible certified targeted group, economically disadvantaged area, or veteran-owned subcontractors are willing and able to do the work.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

**Published Electronically:** *November 13, 2017*

**1230.1830** [Repealed, 42 SR 543]

**Published Electronically:** *November 13, 2017*

### **1230.1850 REMOVAL FROM MINNESOTA SMALL BUSINESS PROCUREMENT PROGRAM.**

Subpart 1. **Removal for failure to fulfill contract.** A business may be removed from the certified directory and the vendor list and may 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 under subpart 1 may apply for reinstatement and participation in the preference program according to part 1230.1175.

Subp. 3. **Removal from the Minnesota small business procurement program when a business no longer qualifies.** A business must be removed from the Minnesota small business procurement program when the business no longer qualifies for the programs under Minnesota Statutes, sections 16C.16 to 16C.19, and parts 1230.1400 to 1230.1910. Notice of removal and the reasons for removal must 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 remains eligible for 120 calendar 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 Minnesota small business procurement program 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 must 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 subpart 4a or a formal review under subpart 4b if facts of the matter are in dispute. If a business fails to choose either an informal or formal review within 15 calendar days of the receipt of the commissioner's request, the right to appeal lapses.

Subp. 4a. **Informal review of removal.** A panel designated by the commissioner, shall consider whether the decision to remove a business from the socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business program was reasonable and whether the removal is in compliance with subpart 3. The panel will review the facts presented by the business and the division. Within 60 calendar days of receipt of a request for review, the panel shall recommend that the commissioner take one of the following actions:

A. reinstate the business to the socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business program;

B. affirm the removal of the business; or

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

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

Subp. 4b. **Formal review of removal.** Within 30 calendar days after a request by the business or panel 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 council or panel for review, and the council or panel shall, within 45 calendar days, make a recommendation. The commissioner shall make a final decision on each appeal. Any person receiving an adverse decision from the commissioner may appeal in any appropriate court of this state.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

**Published Electronically:** *November 13, 2017*

## **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. [Repealed, L 1999 c 232 s 2]

B. Eligibility for set-aside or preference for a specific business participating in the Minnesota small business procurement program must be terminated when the 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 may participate in the Minnesota small business procurement program indefinitely. A business shall graduate from the program when one of the following circumstances exists:

(1) if certified under part 1230.1700 according to Minnesota Statutes, section 16C.16, subdivision 5, 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; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; L 1999 c 232 s 2; 28 SR 499; 42 SR 543*

**Published Electronically:** *November 13, 2017*

## 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 terms and conditions of a contract 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 Employment and Economic Development so that the commissioner of employment 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 Employment and Economic Development and the notice must include a statement that any records of the Department of Employment 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 future participation in the solicitation process.

A. The division may, if circumstances permit, delay an award or completion of a contract to allow the commissioner of the Department of Employment 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 Employment 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 solicitations.** The director of the division shall divide solicitations 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. **Reporting requirements.** The following reporting requirements apply to the Minnesota small business procurement program:

A. Businesses eligible to participate in the program 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 and personal net worth 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 reporting requirement date.

B. Failure to provide the information required by item A may result in removal of the noncomplying business from the Minnesota small business procurement program.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *L 1983 c 289 s 115 subd 1; L 1987 c 312 art 1; 16 SR 194; L 2003 1Sp4 s 1; 28 SR 499; 42 SR 543*

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#### **1230.1905 NOTICE OF CHANGES.**

All businesses shall notify the division in writing of any changes in information submitted in an application for certification or attached information within 30 calendar days of the changes. This section applies to changes in information occurring at any time and is not limited to changes occurring while an application is pending approval.

**Statutory Authority:** *MS s 16B.04; 16C.03; 16C.16; 16C.19*

**History:** *28 SR 499*

**Published Electronically:** *January 14, 2005*

#### **1230.1910 PROFESSIONAL AND TECHNICAL PROCUREMENTS.**

Subpart 1. **Applicability.** Parts 1230.1400 to 1230.1910 apply to the award of professional and technical procurements under Minnesota Statutes, section 16C.16, subdivision 3.

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 16C.16, provided that the contracting agency maintains records stating that the individual meets the terms governing socially and economically disadvantaged persons, economically disadvantaged area persons, or veterans established in part 1230.0150, subparts 24, 26, and 28, and reports the awards in the format required by the division.

**Statutory Authority:** *MS s 16B.04; 16B.18; 16B.19; 16B.22; 16C.03; 16C.16; 16C.19*

**History:** *16 SR 194; 28 SR 499; 42 SR 543*

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**1230.2000** [Repealed, 16 SR 194]

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**1230.2100** [Repealed, 16 SR 194]

**Published Electronically:** *January 14, 2005*

**1230.2200** [Repealed, 16 SR 194]

**Published Electronically:** *January 14, 2005*

**1230.2300** [Repealed, 16 SR 194]

**Published Electronically:** *January 14, 2005*

## DEBARMENT AND SUSPENSION

### **1230.3000 SCOPE.**

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

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

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

### **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 antitrust law, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, 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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.**

The commissioner of transportation may terminate a debarment by order or may award a MnDOT 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 that for purposes of this part is an unforeseen occurrence or combination of circumstances that calls for immediate action in the public interest; or

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

**Statutory Authority:** *MS s 16B.04; 16C.19; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186; 42 SR 543*

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#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

**Published Electronically:** *January 14, 2005*

#### **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; L 1984 c 654 art 2 s 8*

**History:** *9 SR 1186*

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