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### DEPARTMENT OF CONSUMER AND BUSINESS SERVICES, MINORITY, WOMEN AND EMERGING SMALL BUSINESS

#### DIVISION 50

#### DBE/MBE/WBE/ESB CERTIFICATION PROCEDURES

#### Disadvantaged/Minority/Woman Business Certification Procedures

##### 445-050-0000

##### Attorney General's Model Rules

Pursuant to ORS 183.341 the Department of Consumer and Business Services -- Office of Minority, Women and Emerging Small Business adopts the Model Rules of Procedure as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act as amended and effective September 17, 1997.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 183 & ORS 200.055

Stats. Implemented: ORS 183 & ORS 200.055

Hist. MWESB 1-1998, f. & cert. ef. 4-9-98

##### 445-050-0001

##### Purpose

(1) The purpose of OAR 445-050-0001 to 445-050-0090 is to adopt a standard application form and procedure designed to provide complete documentation for certification of businesses as disadvantaged (DBE) or minority/woman (MBE/WBE). A Disadvantaged Business Enterprise shall be certified under the federal criteria set out in 49 CFR 26. Minority Business Enterprises and Woman Business Enterprises shall be certified under the State of Oregon certification program based on ORS 200.005. Firms that are certified DBEs are eligible to participate on federally funded projects to meet DBE commitment requirements. Any certified firms are eligible to participate in private or non-federally funded public sector projects.

(2) These rules also cover publication of a directory, as well as procedures for handling complaints, challenges and appeals.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: MWESB 1-1998, f. & cert. ef. 4-9-98; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0000 [EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97]; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

##### 445-050-0005

##### Definitions

As used in these rules, the following terms shall have the following definitions, unless the context requires otherwise:

- (1) "Contribution of Capital" means a real and substantial contribution of capital, tangible personal assets, or expertise to acquire ownership interest in the firm. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee.
- (2) "Control" or "Controlled" means that Operational and Managerial Control of all aspects of the business is exercised by one or more Qualifying Individual(s).
- (3) "Disadvantaged Business Enterprise" or "DBE" means a business that meets the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26.
- (4) "Independence" or "Independent" means:
  - (a) The business must not be inextricably associated with or dependent upon any non-Disadvantaged, non-Minority or non-woman owned firm;
  - (b) The business owns or leases equipment and resources necessary to perform its work, (where leasing 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 firm); and

(c) The business owner has sufficient expertise in the firm's field of operation to operate the firm independently.

(5) "Management Control" or "Management" means that the Qualifying Individual(s) has/have responsibility for the critical areas of business operations and has the demonstrated ability to make independent and unilateral business decisions needed to guide the future of the business. When the actual management of the business is contracted out to individuals other than the owner or is delegated to employees, those persons who have the power to hire and fire these managers exercise Management Control. Areas of control include, but are not limited to:

(a) Authority and responsibility to sign pay checks and letters of credit;

(b) Authority to negotiate and sign for insurance and/or bonds;

(c) Authority to negotiate for banking services;

(d) Authority to negotiate and sign contracts.

(6)(a) "Minority" means a person who is a citizen or lawful permanent resident of the United States, who is a:

(A) Black American which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanic American which includes persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish or Portuguese culture or origin, regardless of race;

(C) Native American which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;

(i) A person must prove he/she is enrolled or registered by the tribe, clan, nation or Alaskan Native Regional or Village Corporation. Alternatively, the person can provide state or federal certification of enrollment in these groups.

(ii) If a person cannot prove enrollment or registration, he/she must provide proof of qualification to participate in awards or judgments rendered by a federal or state judicial body in favor of the tribe, clan, nation or Alaskan Native Regional or Village corporation.

(iii) A person does not need to reside on a federal or state Indian reservation.

(D) Asian-Pacific American which includes persons whose origin is from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the United States Trust Territories of the Pacific Islands, the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirabati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(E) Subcontinent Asian Americans which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(F) Women;

(G) Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration and/or that are designated under 49 CFR Part 26.

(6)(b) Bona fide Minority group membership shall be established on the basis of evidence to support the individual's claim that the individual is a member of a Minority group and is so regarded by the particular Minority community. However, the OMWESB is not required to accept this claim if it determines the claim to be invalid. If the Minority community does not exist in Oregon, the burden of proof shifts to the applicant to prove he/she is a Socially and Economically Disadvantaged Individual.

(7) "Minority Business Enterprise" or "MBE" means a business that meets the eligibility standards set out in OAR 445-050-0030.

(8) "OMWESB" means the Office of Minority, Women and Emerging Small Business in the Department of Consumer and Business Services.

(9) "Operational Control" or "Operations" means the Qualifying Individual(s) independently makes the basic decisions for the daily operations of the business. The Qualifying Individual(s) must possess the requisite experience in the field of operations for which certification is sought, control the board of directors or management of the business, and receive salary or profits commensurate with his/her ownership interest. Absentee ownership or title ownership by an individual who does not take an active role in making the basic decisions for the daily operations of the business does not constitute Operational Control.

(a) The Qualifying Individual(s) should have training and experience in the field(s) of operation for which certification is sought. The Qualifying Individual(s) does not need to have hands on or direct control of, or expertise in, every aspect of the business' affairs so long as the owner is able to intelligently use and critically evaluate information presented by employees.

(b) The possession of a specialty license by the Qualifying Individual(s) is not a prerequisite for Operational Control. The Qualifying Individual(s) must possess sufficient knowledge about the business to enable him, or her, to maintain day to day control over the operational aspects of the business. In order to determine that the Qualifying Individual(s) has/have the technical expertise and competence to maintain Operational Control, the Qualifying Individual(s) will be required to submit proof of expertise. Expertise can be documented in two ways for trades or professions requiring a specialty license:

(A) The Qualifying Individual(s) may submit a copy of their essential license(s), or

(B) OMWESB may employ the assistance of state resources to help evaluate whether a Qualifying Individual(s) possesses a working knowledge of the technical requirements of their field and is able to evaluate information provided by subordinates in a critical and intelligent manner. State resources may include technical experts from state agencies such as the Building Codes Division, the Board of Engineering Examiners, the Landscape Contractors Board and the Real Estate Agency.

(10) "Ownership" or "Owned" means the Qualifying Individual(s) own a minimum of 51% of each class of voting stock and at least 51% of the aggregate of all classes of stock or own a minimum of 51% of the membership interests.

(11) "Qualifying Individual(s)" means owners/applicants who belong to one of the recognized ethnic Minority Groups, women, or other individuals determined by OMWESB on a case-by-case basis to be socially and economically disadvantaged. For DBE certification the individuals must meet the requirements of 49 CFR 26. The Qualifying Individual(s) must be a citizen of the United States or a permanent resident.

(12) "Small Business" means a small business as defined pursuant to 13 CFR 121. A Small Business shall not include any concern or group of concerns controlled by the same Qualifying Individual or individuals which have average annual gross receipts in excess of the North American Industry Classification System (NAICS) size limit over the previous three fiscal years. A Small Business must not exceed the following size standards:

(a) General Contractors -- \$28,500,000;

(b) Specialty Contractors -- \$12,000,000;

(c) For firms not included in subsections (a) and (b) -- Small Business Administration (SBA) the North American Industry Classification System (NAICS) code size

standard established under 13 CFR 121.

(d) Firms seeking federal DBE certification must meet current Small Business Administration (SBA) business size standard limits for each type of work the firm seeks to perform not to exceed 17,420,000. Firms seeking state MBE/WBE certification must meet the current SBA business size standard limit for a primary area of work. The firm's primary area of work is determined by percentage of income.

(13) "Socially and Economically Disadvantaged Individuals" means those individuals who are citizens of the United States or lawfully admitted permanent residents and who are women, Minorities or any other minorities or individuals found to be disadvantaged by the SBA pursuant to Section 8(a) of the Small Business Act.

(a) It is a rebuttable presumption that Minorities and women are socially and economically disadvantaged.

(b) The OMWESB may also determine on a case by case basis that individuals who are not women or Minorities are Socially and Economically Disadvantaged Individuals.

(c) Socially disadvantaged individuals are people who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as members of a group without regard to their individual qualities.

(A) The social disadvantage must stem from the individual's color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause beyond the individual's control. Social disadvantage cannot be based on factors common to small business.

(B) The individual must demonstrate that:

(i) He or she personally suffered the disadvantage as a result of treatment experienced in the United States;

(ii) The disadvantage was chronic, long-standing, and substantial, not fleeting or insignificant; and

(iii) The disadvantage negatively affected his or her entrance or advancement in the business world.

(d) Economically disadvantaged individuals are Socially disadvantaged individuals whose ability to compete in the United States economy has been impaired due to diminished capital and credit opportunities compared to non-socially disadvantaged individuals in the same or similar business. The Socially and Economically Disadvantaged Individual(s) will be required to submit a Certification of Social and Economic Disadvantage and Statement of Personal Net Worth.

(14) "USDOT" means the United States Department of Transportation.

(15) "Woman Business Enterprise" or "WBE" means a business that meets the eligibility standards set out in OAR 445-050-0030.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.005

Stats. Implemented: ORS 200.005

Hist.: EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0005; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### **445-050-0020**

##### **Eligibility Standards for Disadvantaged Business Enterprises**

(1) To be eligible for certification as a Disadvantaged Business Enterprise, a business must meet the following criteria:

(a) The business must be in existence, operational and in business for a profit.

(b) The business must be a Small Business, but in no case may the average annual gross receipts exceed \$17,420,000.

(c) The business must be Controlled by one or more Socially and Economically Disadvantaged Individual(s).

(d) The business must be Owned by one or more Socially and Economically Disadvantaged Individual(s).

(e) The one or more Socially and Economically Disadvantaged Individual(s) must have made a contribution of capital to the business, which is commensurate with their ownership interest.

(f) The business must be Independent.

(g) The business must be properly licensed and registered in the state of Oregon.

(h) The business must have or lease (where leasing 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 firm) sufficient machinery, equipment and employees to operate. In making this determination the OMWESB shall compare the operations of the DBE to a non-DBE operation in the same or similar business.

(2) The OMWESB will utilize 49 CFR 26 to review for eligibility for certification as a DBE. In addition, OMWESB will apply written directives of the USDOT, administrative guidelines and written decisions of the USDOT on appeals of state certification decisions so long as they are in accord with these rules.

(3) In making determinations under this section the OMWESB shall not consider whether the business has previously performed or would be able to perform a commercially useful function. Repeated failure by a business to perform a commercially useful function may, however, indicate that the business is not Independent, Owned or Controlled by a Socially and Economically Disadvantaged Individual.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.005 & 200.055

Stats. Implemented: ORS 200.005 & 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0020; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### **445-050-0030**

##### **Eligibility Standards for Minority and Women Business Enterprises**

To be eligible as a Minority or Woman Business Enterprise, a business must meet the following criteria. The OMWESB may perform on-site investigations to verify any of the requirements of this rule.

- (1) The business must be a Small Business. The average annual gross receipts for a firm and its affiliates for the previous three fiscal years must not exceed the amounts established under SBA's NAICS codes.
- (2) The business must be Controlled by one or more Qualifying Individual(s). The Qualifying Individual(s) must establish Minority Group or gender status by identification, US citizenship, birth certificate, driver's license, state identification cards, naturalization documents, military discharge papers, visa, passport, etc., or evaluation for social and economic disadvantage.
- (3) The business must be Owned by one or more Minority or women owners.
- (4) The one or more Qualifying Individual(s) must have made a contribution of assets to the business .
- (5) The business must be Independent.
- (6) The business must be in existence, operational and in business for profit.
- (7) The business must be properly licensed, and if required, legally registered in the state.
- (8) The business must have or lease (where leasing 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 firm) sufficient machinery, equipment and employees to operate. In making this determination the OMWESB shall compare the operations of the MBE/WBE to a non-MBE/WBE operation in the same or similar business.
- (9) The Qualifying Individual(s) must have training and experience in the field(s) of operation for which certification is sought. Examples of construction related activities, including but not limited to:
  - (a) Currently holds or has previously held the essential license in the field in which this firm operates;
  - (b) Has read and interpreted blueprints and specifications;
  - (c) Has done take offs;
  - (d) Has prepared estimates and bids;
  - (e) Goes on site and determines if the work is proceeding in accordance with the plans;
  - (f) Answers technical questions from subordinates;
  - (g) Resolves field problems;
  - (h) Supervises field operations.; Examples of professional related activities, including but not limited to;
  - (i) Has a college degree in the field of expertise;
  - (j) Has years of experience and training in the field of expertise;
  - (k) Has experience in project management in the field of expertise.

Stat. Auth.: ORS 200.005 & 200.055

Stats. Implemented: ORS 200.005 & 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0030; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### **445-050-0040**

##### **Application Form and Procedure**

- (1) Application Form(s). Businesses wishing to be certified as Disadvantaged Business Enterprises must complete the Uniform Certification Application form required by the 49 CFR 26, Appendix G. Minority or Woman Business Enterprises shall complete the application form designed by the OMWESB. The application forms are designed to solicit information to determine whether an applicant business is eligible for certification as a DBE, MBE, or WBE under this chapter. The applications are designed to provide the OMWESB with sufficient information to determine whether an applicant is eligible for certification for both federally assisted and non-federally assisted contracts. Incomplete applications will be "Denied."
- (2) Submittal of Application. The completed application form, together with all required supporting documentation, shall be submitted by mail or in person to the Office of Minority, Women and Emerging Small Business, P.O. Box 14480, Salem, OR 97309-0405
- (3) Processing Applications. The OMWESB will conduct a review and take action on completed applications as promptly as its resources permit. The order of priority for processing applications shall be the date received by OMWESB.
- (4) On-site Investigations. The OMWESB must conduct an on-site investigation and interview at the owner's place of business for all applicants seeking DBE certification. The purpose of the on-site investigation is to verify the information submitted with the application form. The applicant shall fully cooperate with such an investigation and make available any additional information requested by the OMWESB. DBEs applying from outside the State of Oregon are required to have an on-site interview conducted by their home state jurisdiction. The OMWESB may conduct an on-site investigation and interview at the owner's place of business to verify information necessary for making eligibility decisions for applicants seeking MBE/WBE certification. Last minute on-site cancellations and no shows by a DBE Applicant could result in a DBE being denied certification for failure to submit information needed to make a determination.
- (5) Determination. The OMWESB shall make a determination based on the eligibility standards included in this chapter and the federal requirements (49 CFR Part 26). As part of its investigation, the OMWESB may require all firms to provide information in addition to that requested on the application form. The applicant has the burden of proving that it is eligible for certification and recertification at all levels of review. Applicants shall be notified by mail promptly after a decision has been made. Where the OMWESB has denied an application, the letter shall set forth the specific reasons for the denial. The DBE/MBE/WBE shall notify the OMWESB of any changes in its Ownership or Management which may affect its continued eligibility as a DBE/MBE/WBE within 30 days of the change. Failure to notify OMWESB may result in denial/decertification.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0040; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### 445-050-0050

##### Directory

The OMWESB shall maintain a state-wide unified directory of certified firms as follows:

- (1) Certified firms shall use the current business name as registered with the Secretary of State Corporation Division for the OMWESB directory (sole proprietorships not registered with the Secretary of State Corporation Division shall use the name listed on their business license), and will use no other name in contracting business. An Assumed Business Name may be used for contracting purposes, but only if it is written in conjunction with the registered business name.
- (2) The directory will be maintained in an electronic format and available on-line. It shall indicate the certification status of each firm: DBE, MBE, WBE and/or ESB. The directory information shall include firm's telephone/fax numbers and mailing addresses. The directory shall also list the firm's capabilities.
- (3) The OMWESB shall update the directory on a quarterly basis, with certifications, recertifications, change of business address, phone number, etc. It is the responsibility of the applicant to assure that OMWESB has a current address and phone number.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0050; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### 445-050-0060

##### Recertification

- (1) Certification as a DBE/MBE/WBE is valid for three years from the date of certification.
- (2) A recertification notice shall be sent to certified DBE/MBE/WBEs approximately two months prior to expiration of the current certification. The DBE/MBE/WBE shall promptly return the recertification application along with any requested documentation (by-law amendments, evidence of changes in ownership, etc). The signed and notarized recertification application shall be reviewed by the OMWESB to determine continued eligibility. An on-site investigation may be conducted to verify information submitted to the OMWESB. It is the responsibility of the DBE/MBE/WBE to provide the information deemed necessary by the OMWESB to ascertain eligibility for recertification.
- (3) Failure to return the completed recertification application by the expiration date shall lead to administrative closure. Recertification is not automatic. The DBE/MBE/WBE must demonstrate that their business currently meets the qualifications as listed in this chapter.
- (4) An affidavit of "no change" will be sent to DBE firms annually approximately 30 days prior to the one-year and two-year anniversaries of the certification date. The completed affidavit, along with federal tax information for the previous years and documentation of any changes, must be submitted prior to the anniversary date, or the firm will be decertified. MBE and WBE firms are exempt from this requirement.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0060; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### 445-050-0070

##### Decertification/Denial of DBE

This rule applies only to the decertification or denial of a DBE under 49 CFR Part 26. A DBE may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26. The OMWESB may also deny certification to any DBE applicant that does not meet the eligibility standards set out in OAR 445-050-0020 and 49 CFR 26. The procedure is as follows:

- (1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the DBE 21 days prior to the date of the decertification, and indicate the specific reasons for decertification.
- (2) In the case of denial of initial certification or recertification, the DBE or applicant will be notified in writing of the denial and the reasons therefore.
- (3) In either a decertification or denial of initial certification or recertification of a DBE, the DBE or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing. If the DBE or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of a final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.
- (4) Any applicant or DBE that believes it has been wrongly decertified or denied certification or recertification by the OMWESB may also file an appeal in writing, signed and dated, with the USDOT. The applicant or DBE must provide the OMWESB with a copy of the USDOT appeal at the same time it submits the appeal to the USDOT. The appeal shall be filed no later than 90 days after the date of decertification or denial of certification or recertification. The Secretary of Transportation may extend the time for filing or waive the time limit, specifically listing the reasons in writing, in the interests of justice. The appeals procedure to the USDOT is set out in 49 CFR 26.
- (5) A DBE may be decertified if the Socially and Economically Disadvantaged Individual dies or leaves the business.
- (6) Any business denied certification as a DBE will be ineligible to reapply for a period of 12 months.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; Former (1)(c)(A) through (3) renumbered to 121-50-075; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0070; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

#### 445-050-0075

##### Decertification/Denial of MBE/WBE

This rule applies only to the decertification or denial of MBE/WBE status under Oregon law. An MBE/WBE may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0030. If the Minority or woman owner dies or leaves the business, the MBE/WBE may be decertified. The OMWESB may also deny certification to any MBE/WBE applicant that does not meet the eligibility standards set out in OAR 445-050-0030. The procedure is as follows:

- (1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the MBE/WBE 21 days prior to the date of the decertification, and indicate the specific reasons for decertification.
- (2) In the case of denial of initial certification or recertification, the MBE/WBE will be notified in writing of the denial and the reasons therefore.
- (3) In either a decertification or denial of initial certification or recertification of a MBE/WBE, the MBE/WBE or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing.
- (4) If the MBE/WBE or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of the final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; Renumbered from former 121-50-070(1)(c)(A) through (3); BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0075; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

#### 445-050-0080

##### Third Party Complaints

Third party complaints regarding certification of DBE/MBE/WBEs may be submitted to the OMWESB and will be processed according to the following procedure:

- (1) Any individual, firm or agency who believes that an applicant certified as a DBE/MBE/WBE does not qualify under the standards of eligibility for certification may file a third party complaint with the OMWESB.
- (2) The third party complaint must be submitted to the OMWESB in writing, and must set forth facts which indicate that the DBE/MBE/WBE is not eligible, along with copies of any supporting documents the complainant may have. Facts should be described in as much detail as possible.
- (3) The complainant must sign the third party complaint and give an address and telephone number where complainant may be reached during the investigation. In responding to requests for information concerning any aspect of the DBE, MBE, or WBE programs, OMWESB complies with provisions of the Federal Freedom of Information and Privacy Acts and the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the public any information concerning the DBE, MBE, WBE program release of which is not prohibited by federal or state law. OMWESB may maintain the identity of complainants confidential throughout the course of the investigation, at their election. If such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process, to other parties, the complainant must be advised for the purpose of waiving of the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.
- (4) The OMWESB will investigate each third party complaint as promptly as resources allow. If preliminary investigative results show good cause for in-depth investigation, The OMWESB will notify the DBE/MBE/WBE of the third party complaint by certified mail. The DBE/MBE/WBE shall cooperate fully in the OMWESB's investigation.
- (5) After the investigation is completed, the OMWESB shall issue a written decision, either a rejection of the third party complaint or a Notice of Intent to Decertify. The written decision shall be mailed to the DBE/MBE/WBE involved and to the complainant. No DBE/MBE/WBE will be decertified based on a third party complaint without first having an opportunity to respond to OMWESB regarding the complaint. DBE firms may request a contested case hearing and/or appeal directly to USDOT as set out in OAR 445-050-0070. If an MBE/WBE receives the notice of intent to decertify, the MBE/WBE may request a contested case hearing as set out in 445-050-0075.
- (6) If the decision of the OMWESB is to continue certification of the DBE, the complainant may submit a complaint to the Secretary of USDOT.
- (7) Information received about an applicant prior to the initial certification being made will not be considered a third party complaint, but will be considered in the investigation of the application for certification.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0080; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### 445-050-0090

##### Challenges

- (1) Any third party may challenge a Socially and Economically Disadvantaged Individual if the individual is an owner of a business certified or seeking certification as a DBE, MBE, or WBE. The challenge shall be made in writing to the OMWESB.
- (2) Within the letter, the challenging party shall include all information available that is relevant to a determination of whether the challenged party is, in fact, a Socially and Economically Disadvantaged Individual.
- (3) The OMWESB shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is, in fact, not a Socially and Economically Disadvantaged Individual:
  - (a) If the OMWESB determines that there is no reason to believe that the challenged party is not a Socially and Economically Disadvantaged Individual, the OMWESB shall so inform the challenging party in writing;

- (b) If the OMWESB determines that there is reason to believe that the challenged party is not a Socially and Economically Disadvantaged Individual, the OMWESB shall begin a proceeding, as set out below, to analyze this determination;
- (c) The OMWESB shall notify the challenged party in writing that his/her status as a Socially and Economically Disadvantaged Individual has been challenged;
- (d) The notice shall summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the OMWESB (within a reasonable period specified by the OMWESB) information sufficient to permit the OMWESB to evaluate his/her status as a Socially and Economically Disadvantaged Individual;
- (e) The OMWESB shall evaluate the information available to it and make a proposed determination of whether the challenged party is a Socially and Economically Disadvantaged Individual. The OMWESB shall notify both parties of this proposed determination in writing, setting forth the reasons for this determination;
- (f) During the pendency of a challenge under this rule, the presumption that the challenged party is a Socially and Economically Disadvantaged Individual shall remain in effect.
- (4) After the investigation is completed, the OMWESB shall issue a written decision, either a rejection of the third party challenge, Notice of Intent to Decertify or Denial. The written decision shall be mailed to the DBE, MBE or WBE involved and to the complainant. No firm will be decertified or denied certification based on a third party challenge without first having an opportunity to respond to OMWESB regarding the complaint.
- (5) DBE firms may appeal the final determination of OMWESB, under subsection (3)(e) of this rule, and request a contested case hearing and/or appeal directly to USDOT as set out in OAR 445-050-0070 and in accordance with 49 CFR 26. If an MBE/WBE receives the Notice of Intent to Decertify, the MBE/WBE may request a contested case hearing as set out in 445-050-0075.
- (6) In responding to requests for information concerning any aspect of the DBE, MBE, or WBE programs, OMWESB complies with provisions of the Federal Freedom of Information and Privacy Acts and the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the public any information concerning the DBE, MBE, WBE program release of which is not prohibited by federal or state law. OMWESB may maintain the identity of complainants confidential throughout the course of the investigation, at their election. If such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process, to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

[Publications: Publications referenced are available from the agency.]

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: EX 1-1988(Temp), f. & cert. ef. 7-14-88; EX 3-1988(Temp), f. 9-2-88, cert. ef. 9-1-88; EX 4-1988, f. 12-5-88, cert. ef. 12-15-88; EX 2-1991, f. & cert. ef. 10-24-91; BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0090; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

### Emerging Small Business Certification Procedures

#### 445-050-0105

##### Purpose

(1) The purpose of OAR 445-050-0105 to 445-050-0165 is to adopt a standard application form and procedure designed to provide complete documentation for certification of businesses as Emerging Small Businesses (ESBs); to adopt a procedure for the handling of complaints; to adopt a procedure for the handling of investigations; and to adopt a procedure for the issuing of sanctions. An enterprise certified by OMWESB pursuant to these rules shall be considered so certified by any public contracting agency as defined in ORS 279.011 (5), in the State of Oregon. The OMWESB is the sole certification agency for the State of Oregon and all political subdivisions.

(2) These rules also cover publication of a directory as well as procedures for complaints and appeals.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0105;

#### 445-050-0106

##### Rulemaking: Attorney General's Model Rules

Pursuant to ORS 183.341 the Department of Consumer and Business Services -- Business Administration Division adopts the Model Rules of Procedures as promulgated by the Attorney General of the State of Oregon under the Administrative Procedures Act as amended and effective September 17, 1997.

Stat. Auth.: ORS 183

Stats. Implemented: ORS 183 & ORS 200.055

Hist.: MWESB 1-1998, f. & cert. ef. 4-9-98

#### 445-050-0115

##### Eligibility Standards

To be eligible for certification as an ESB, a business must meet all the following criteria:

- (1) A firm must be in existence, operational and in business for a profit;
- (2) Have average, annual gross receipts over the last three years not exceeding \$1.5 million for tier one construction firms and \$600,000 for tier one non-construction firms; and \$3 million for tier two construction firms and \$1 million for tier two non-construction firms.
- (3) The department will adjust annually the amount of the average annual gross receipts required to qualify as a tier one firm or a tier two firm using the most recent three-year average of the Portland-Salem Consumer Price Index (CPI) for All Urban Consumers for All Items, as reported by the United States Bureau of Labor Statistics.
- (4) If a tier one firm provides compelling information showing, in the judgment of the Department of Consumer and Business services, that the firm has not been afforded an opportunity to bid on emerging small business projects during a year of eligibility, the department will extend the tier one designation of the firm for an additional year. A tier one firm may receive the extension only once.
- (5) Have its principal place of business located in the State of Oregon, as determined by tax filing status;

(6) Be independent. An ESB is not eligible if it is a subsidiary or parent company belonging to a group of firms that are owned or controlled by the same individuals if, in the aggregate, the group of firms does not qualify as a tier one firm or a tier two firm.

(7) Be properly licensed and if required, legally registered in this state: (e.g., registered as a domestic corporation or partnership, assumed business name filed, Construction Contractors Board registration, etc.);

(8) Have fewer than 20 full-time equivalent employees in tier one and have fewer than 30 full-time equivalent employees in tier two. A full-time equivalent employee is calculated as follows:

(a) Hours worked by part-time and seasonal employees shall be converted into full-time equivalent employee hours by dividing the total hours worked by all part-time and seasonal employees by 2080.

(b) The owners of the firm shall not be considered full-time equivalent employees.

(c) The year period during which full-time equivalent employees shall be calculated shall be the same period as the ESB's tax year.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0115; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2005(Temp), f. & cert. ef. 12-29-05 thru 6-27-06; MWESB 1-2006, f. & cert. ef. 6-15-06

#### **445-050-0125**

##### **Application Form and Procedure**

(1) OMWESB will utilize ORS 200.005 to review for eligibility for certification as an ESB tier one or tier two.

(2) Application Form. Firms wishing to be certified as ESBs shall complete the application form provided by OMWESB.

(3) Submittal of application. The completed application form, together with all required supporting documentation, shall be submitted to the Office of Minority, Women and Emerging Small Business, 350 Winter St NE, Salem, PO Box 14480, OR 97309-0405

(4) Processing applications. The OMWESB will conduct a review and take action on completed applications as promptly as its resources permit. The order of priority for processing applications shall be the date received by OMWESB.

(5) Determination. The OMWESB shall make a determination based on the eligibility standards included in this chapter and the applicable laws of the State of Oregon. As part of its investigation, OMWESB may require owners to provide information in addition to that requested on the application forms. The applicant has the burden of proving that it is eligible for certification and re-certification at all levels of review. Applicants shall be notified by mail promptly after a decision has been made. Where the OMWESB has denied an application, the letter shall set forth the specific reasons for the denial. Certification may be revoked at any time if the OMWESB determines that the ESB no longer meets the eligibility standards. The ESB shall notify OMWESB within 30 days of any changes in its ownership which may affect its continued eligibility as an ESB. Failure to notify OMWESB may result in denial/decertification.

(6) The applicable emerging small business size standard for each applicant set out in OAR 445-050-0115(1)(b) shall be determined by the firm's primary area of work. Registration of the firm with Construction Contractors and/or Landscape Contractors Board will establish a firm as a construction firm. A construction-related trucking firm will also be considered a construction firm for the purposes of this program.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0125; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2005(Temp), f. & cert. ef. 12-29-05 thru 6-27-06; MWESB 1-2006, f. & cert. ef. 6-15-06

#### **445-050-0135**

##### **Recertification**

(1) Certification as an ESB is valid for three years from the date of certification.

(2) A recertification notice shall be sent to certified ESBs 60 days prior to expiration of current certification. The ESB shall promptly return the recertification application along with any requested documentation (e.g., evidence of change in ownership; federal tax returns for the last year, etc.). Recertification is not automatic. The applicant must demonstrate that their business still meets the criteria set out in OAR 445-050-0105 through 445-050-0165.

(3) The signed and notarized recertification application shall be reviewed by the OMWESB staff to determine the ESB's continued eligibility. A request to verify information submitted to OMWESB may be required.

(4) Failure to return the completed recertification application by the expiration date shall result in administrative closure of the file.

(5) Firms may only be certified as an ESB for a maximum of twelve consecutive years from original certification date or 13 years for tier 1 firms that meet the criteria for eligibility standards under OAR 445-050-0115(d).

(6) An annual affidavit of "no change" will be sent to the firm approximately 30 days prior to the one-year and two-year anniversaries of the certification date. The completed affidavit, along with federal tax information for the previous year, and documentation of any changes, must be submitted prior to the anniversary date, or the firm will be decertified.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0135; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00; MWESB 1-2005(Temp), f. & cert. ef. 12-29-05 thru 6-27-06; MWESB 1-2006, f. & cert. ef. 6-15-06

#### **445-050-0145**

##### **Decertification, Denial of Certification or Denial of Recertification**

This rule applies only to the decertification or denial of ESB status under Oregon law. An ESB may be decertified at any time the OMWESB determines that the firm no longer meets the eligibility standards set out in OAR 445-050-0115. The OMWESB may also deny certification to any ESB applicant that does not meet the eligibility standards set out in OAR 445-050-0115. The procedure is as follows:

(1) In the case of decertification, the OMWESB shall issue a Notice of Intent to Decertify the ESB 21 days prior to the date of the decertification, and indicate the specific

reasons for decertification.

(2) In the case of denial of initial certification or recertification, the ESB will be notified in writing of the denial and the reasons therefore.

(3) In either a decertification or denial of initial certification or recertification of a ESB, the ESB or applicant has 21 calendar days from the date of the Notice of Intent to Decertify or the letter of denial in which to submit a written request for a contested case hearing.

(4) If the ESB or applicant requests a contested case hearing, the decertification or denial of recertification will be stayed pending the issuance of the final order. Contested case hearings will be conducted in accordance with ORS 183.310 to 183.550 and OAR 445-050-0000. Following the contested case hearing, the proposed order issued by the Hearings Officer will be forwarded to the Manager of the OMWESB for issuance of the final order. If no written request for a contested case is received by OMWESB within the 21-day period, the decertification/denial will be final.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; Renumbered from 121-050-0145 by MWESB 2-1998, f. & cert. ef. 12-11-98; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

#### **445-050-0155**

##### **Complaints**

(1) Complaints regarding certification of an ESB may be submitted to the OMWESB and will be processed according to the following procedure:

(2) Any individual, firm or agency who believes that an applicant certified as an ESB does not qualify under the standards of eligibility for certification may file a complaint with the OMWESB Manager.

(3) The complaint must be submitted to the OMWESB Manager, must be in writing, and must set forth facts which indicate that the ESB is not eligible, along with copies of any supporting documents the complainant may have. Facts should be described in as much detail as possible.

(4) The complainant must sign the complaint and give an address and telephone number where he or she may be reached during the investigation.

(5) The OMWESB will investigate each complaint as promptly as resources allow. The ESB shall cooperate fully in the OMWESB's investigation. The OMWESB will notify the ESB of the complaint by certified mail.

(6) After the investigation is completed, the OMWESB shall either issue a written decision to the ESB and the complainant, stating that there are no grounds for decertification or the OMWESB shall provide a Notice of Intent to decertify in accordance with OAR 445-050-0145.

(7) In responding to complaints or requests for information concerning any aspect of the ESB program, OMWESB complies with provisions of the State of Oregon Freedom of Information and Privacy Acts. The OMWESB may make available to the public any information concerning the ESB program release of which is not prohibited by state law. Notwithstanding the provisions of paragraph (7) of this section, the identity of complainants may be kept confidential throughout the course of the investigation, at their election. If such confidentiality will hinder the investigation, proceeding, or hearing, or result in a denial of appropriate administrative due process, to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0155; MWESB 1-2004, f. 1-15-04, cert. ef. 2-15-04

#### **445-050-0165**

##### **Directory**

OMWESB shall maintain a directory of certified ESBs as follows:

(1) The Directory information shall indicate the status of each firm as an ESB and include:

(a) Mailing address and telephone/fax numbers of firm;

(b) Description of the services the firm provides.

(2) OMWESB shall update the directory with certifications, recertifications, denials, change of business address, phone number, etc. It is the responsibility of the applicant to assure that OMWESB has a current address and phone number.

Stat. Auth.: ORS 200.055

Stats. Implemented: ORS 200.055

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0165

#### **445-050-0170**

##### **Representation of OMWESB by Officer or Employee in Contested Case Hearings**

(1) Subject to the approval of the Attorney General, an officer or employee of OMWESB is authorized to appear on behalf of OMWESB in contested case hearings.

(2) The OMWESB representative may not make legal argument on behalf of OMWESB.

(a) "Legal argument" includes arguments on:

(A) The jurisdiction of OMWESB to hear the contested case;

(B) The constitutionality of a statute or rule or the application of a constitutional requirement to OMWESB; and

(C) The application of court precedent to the facts of the particular contested case proceeding.

(b) "Legal argument" does not include presentation of evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:

(A) The application of the facts to the statutes or rules directly applicable to the issues in the contested case;

(B) Comparison of prior actions of OMWESB in handling similar situations;

(C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case; and

(D) The admissibility of evidence of the correctness of procedures being followed.

(3) When an officer or employee of OMWESB represents OMWESB, the presiding officer shall advise such representative of the manner in which objections may be made and matters preserved for appeal. Such advice is of a procedural nature and does not change applicable law on waiver of the duty to make timely objection. Where such objections involve legal argument, the presiding officer shall provide reasonable opportunity for the agency officer or employee to consult legal counsel and permit such legal counsel to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.450(7) & ORS 183.450(8)

Stats. Implemented: ORS 183.450(7)(b)

Hist.: MWESB 2-1998 f. & cert. ef. 12-11-98; MWESB 1-2000, f. 11-7-00, cert. ef. 12-1-00

#### Notification to Advocate of Solicitations

**445-050-0200**

##### Timely Notice

"Timely notice" as used in ORS 200.035 shall mean at the time the state agency publicly releases the contract and bid request solicitations.

Stat. Auth.: ORS 200.035

Stats. Implemented: ORS 200.035

Hist.: BAD 1997, f. & cert. ef. 5-20-97; MWESB 2-1998, f. & cert. ef. 12-11-98, Renumbered from 121-050-0200

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