

Title 1—OFFICE OF ADMINISTRATION
Division 30—Division of Facilities Management, Design and Construction
Chapter 5—Minority/Women Business Enterprises

PROPOSED AMENDMENT

1 CSR 30-5.010 Minority/Women Business Enterprise and Service Disabled Veteran Business Enterprise Participation in State Construction Contracts. The Commissioner is amending sections (1), (4)-(11).

PURPOSE: This amendment updates the purpose statement, updates terminology and implements provisions consistent with Executive Order 15-06.

*PURPOSE: This regulation establishes a uniform program by which Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) that have been certified [or approved] by the Office of [Workforce Diversity (OSWD)] **Equal Opportunity (OEO) and Service Disabled Veteran Business Enterprises (SDVEs) listed with the Division of Facilities Management, Design and Construction (FMDC) [as such]** may participate in construction contracts let by the [Office of Administration, state of Missouri] **FMDC**. [This regulation provides that the state of Missouri, except to the extent that the commissioner of the Office of Administration determines otherwise, shall require that for contracts bid and awarded in an amount greater than or equal to one hundred thousand dollars (\$100,000), the successful bidder shall have as an overall goal subcontracting not less than ten percent (10%) of the awarded contract price for work to be performed by MBEs, and shall have as an overall goal subcontracting not less than five percent (5%) of the awarded contract price for work to be performed by WBEs. Individual project goals may be set to higher than the overall goals where availability of MBE/WBEs has been demonstrated to be higher such as the St. Louis and Kansas City metropolitan areas. Individual project goals may be set lower than the overall goals in areas where availability of MBE/WBEs has been demonstrated to be lower, such as rural communities.]*

(1) Definitions.

(A) “Bidder” means one who submits a response to a solicitation by [the Office of Administration] **FMDC** for construction services.

(B) “Bid” means a bid proposal submitted to [the Division of Facilities Management, Design and Construction] **FMDC** by a bidder.

(C) [“Compliance” means the condition existing when a bidder or contractor has met the requirements of these regulations.

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

[(E)] (D) “Contractor” means one who participates, through a contract, in any [program] **project** covered by these regulations.

[(F)] (E) “Commissioner” means the commissioner of the Office of Administration.

[(G)] (F) “Director” means the director of the Division of Facilities Management, Design and Construction.

(G) “**FMDC**” means **Division of Facilities Management, Design and Construction within the Office of Administration.**

(H) “Joint venture” means an association of two (2) or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge.

(I) “MBE” means Minority Business Enterprise.

(J) “Minority.” The definition in 1 CSR 10-17.010(1)[(G)](F) will be applied.

(K) “Minority Business Enterprise.” The definition in section 37.020.1(3), RSMo, will be applied.

(L) [*“OA” means the Office of Administration.*]

(M) [*“Kansas City metropolitan area” means the City of Kansas City and the Missouri counties of Jackson, Cass, and Clay.*]

“OEO” means the Office of Equal Opportunity within the Office of Administration.

[(N)] (M) “Service-disabled veteran” means any individual who is disabled as certified by the appropriate federal agency responsible for the administration of veterans’ affairs.

[(O)] (N) Service-disabled veteran business enterprise (SDVE). The definition contained in section 34.074, RSMo, will be applied.

[(P)] [*“St. Louis metropolitan area” means the City of St. Louis and the Missouri counties of St. Charles and St. Louis.*]

[(Q)] (O) “WBE” means Women Business Enterprise.

[(R)] (P) “Women Business Enterprise” [*means a business concern which is at least fifty-one percent (51%) owned by one (1) or more women or in the case of any publicly-owned business at least fifty-one percent (51%) of the stock of which is owned by one (1) or more women and whose management and daily business operations are controlled by one (1) or more women*]. **The definition in section 37.020(6), RSMo, will be applied.**

[(S)] [*“OEO” means the Office of Equal Opportunity.*]

[(T)] [*“FMDC” means Division of Facilities Management, Design and Construction.*]

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

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

(4) Commissioner, Duties, and Responsibilities.

[(A)] The commissioner shall, through the Office of Equal Opportunity (OEO) for [*MBE/WBEs*] **M/WBEs** and through [*the Division of Facilities Management, Design and Construction*] (**FMDC**) for SDVEs—

[1.] (A) Compile, maintain, and make available a directory of [*MBE/WBE*] **M/WBE** and SDVE vendors along with their capabilities relevant to construction contracting requirements in general and to particular solicitations. OEO or FMDC shall make the directory available, upon request, to all bidders and contractors. The directory shall specify the name of the [*MBE/WBE*] **M/WBE** or SDVE, the [*type of business it conducts*]**categories of work in which the firm is certified, if applicable, [and] its address, phone number, email address, age of firm, and contact person;**

[2.] (B) To the extent deemed appropriate, include all [*MBE/WBEs*] **M/WBEs** and SDVEs on open solicitation mailing lists;

[3.] (C) Annually report in writing to the commissioner concerning the awarding of contracts to [MBE/WBEs] M/WBEs or SDVEs; and

[4.] (D) Certify the eligibility of [MBE/WBEs] M/WBEs and joint ventures involving [MBE/WBEs] M/WBEs and maintain listings of SDVEs.

(5) [Percentage] **Contract Goals and Compliance with Program Requirements.**

(A) For contracts bid and awarded [in an amount greater than or equal to one hundred thousand dollars (\$100,000)] by FMDC, the successful bidder shall have as **the** overall [goals subcontracting not less than ten percent (10%) of the awarded contract price for work to be performed by MBEs, shall have as overall goals subcontracting not less than five percent (5%) of the awarded contract price for work to be performed by WBEs, and shall have as overall goals of subcontracting] **SDVE contract goal** not less than three percent (3%) of the work to be performed by SDVEs. [Individual project goals may be set to higher than the overall goals where availability of MBE/WBEs has been demonstrated to be higher, such as the St. Louis and Kansas City metropolitan areas. Individual project goals may be set lower than the overall goals in areas where availability of MBE/WBEs has been demonstrated to be lower, such as rural communities.]

(B) [If after the contract has been awarded to the contractor, the contractor fails to meet or maintain the contracted participation amount(s), the contractor must satisfactorily explain to the director why the participation amount(s) cannot be achieved and why meeting the participation amount(s) was beyond the contractor's control.

1. It is the responsibility of the contractor to submit documentation that supports the utilization of MBE/WBE subcontractors to OEO and the utilization of SDVE subcontractors to FMDC on a regular basis, with the understanding that the amounts submitted might be verified by OEO or FMDC staff. If upon verification it is found that the amounts disagree, then the contractor must satisfactorily explain to the directors of FMDC or OEO the reason for the discrepancies.

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

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

2. Declaring the contractor in breach of contract.]

Executive Order 15-06 states that the State of Missouri's Annual Aspirational Program Goal for Minority Business Enterprises is 10% of all state annual procurement funds expended by executive branch agencies, and the State of Missouri's Annual Aspirational Program Goal for Women Business Enterprises is 10% of all such state annual procurement funds. These goals are a benchmark by which M/WBE opportunities to participate in state procurement are monitored and evaluated. These 10% goals do not authorize or require FMDC to set M/WBE contract goals at the 10% level, or any other particular level, or to take any special administrative steps if the contract goals are above or below 10%.

(C) FMDC may use individual contract goals to help meet the State's Annual Aspirational Program Goals. FMDC may establish individual contract goals, with support from the Office of Equal Opportunity (OEO). FMDC shall set each contract goal by reviewing the type of project, elements of work to be performed, time for contract performance, and geographical location, history of M/WBE and non-M/WBE utilization, and availability of ready, willing, and able M/WBEs certified by OEO. The goals will be expressed in the bid document as a percentage of the total contract value. Individual contract goals may be set higher or lower than the State's Annual Aspirational Program Goals.

(D) Bidders must, in order to be responsive, make sufficient good faith efforts to meet M/WBE and SDVE contract goals. The bidder can meet the individual contract goals in either one of two ways. First, the bidder can meet the goals through documenting commitments for participation by M/WBEs and SDVEs sufficient to meet the M/WBE and SDVE contract goals. Second, the bidder can document adequate good faith efforts pursuant to subsection (5), Good Faith Efforts Waiver.

(E) M/WBE and SDVE individual contract goals can be met by a qualified M/WBE or SDVE vendor and/or through the use of qualified M/WBE and SDVE subcontractors, suppliers, joint ventures, or other arrangements that afford meaningful opportunities for M/WBE and SDVE participation. M/WBE vendors shall be certified by OEO on the opening date of a bid/proposal. If a M/WBE vendor's certification has expired or otherwise ended, but the vendor has submitted its renewal application or other supporting documents to OEO prior to the bid/proposal opening and certification is reinstated prior to contract award, then the M/WBE vendor shall be considered certified for purposes of the responsiveness of the bid or proposal.

(F) If the bidder is awarded the contract, the amount of the M/WBE and SDVE vendor participation committed to by the bidder shall be a binding contractual requirement.

(G) A bidder that is certified as a MBE, WBE or SDVE, or a combination thereof, can meet the MBE, WBE or SDVE target participation percentages as long as the bidder is performing at least the total of the combined target MBE, WBE or SDVE percentage of the contract value.

(H) Once the contract is awarded, it is the responsibility of the contractor to submit documentation to FMDC on a monthly basis as required in the solicitation that supports the utilization of M/WBE and SDVE subcontractors.

1. No dollar value of work performed under a contract may be counted toward the contract goal after the M/WBE has ceased to be certified.

2. The participation of a M/WBE or SDVE subcontractor toward a contract goals cannot be counted until the amount has been paid to the M/WBE or SDVE.

(I) If the contractor fails to fulfill its contractual responsibilities, and no M/WBE or SDVE waiver has been granted, the Director may cancel the contract and/or suspend or debar the contractor from participating in future state procurements for a period of a minimum of six months, up to permanent debarment or withhold payment to the contractor in an equal amount to the value of the participating commitment less actual payments made by the contractor to the participating entity. If the director determines that a contractor has met its contractual commitments, any withheld funds shall be released.

1. A contractor may appeal a suspension or debarment to the commissioner by filing a written appeal within twenty (20) days from the date on the notice of suspension or debarment. The suspension or debarment remains in effect pending the results of the appeal. The commissioner may request additional documentation, information or explanation when reviewing the appeal.

2. At the time of contract renewal, a contractor must verify it is meeting its contractual obligations. If the contractor is not meeting its obligations, the contract renewal shall not be processed unless and until the contractor fulfills its obligations satisfactorily or a waiver on the basis of good faith efforts is obtain from FMDC.

(6) Good Faith Efforts Waiver.

(A) A bidder is required to make a good faith effort to locate and contract with *[MBE/WBEs]* **M/WBEs** and SDVEs. If a bidder has made a good faith effort to *[secure]* **meet the *[required MBE/WBEs]* M/WBE *[and SDVEs and has failed]* or SDVE contract goal**, the bidder may submit with *[their]* **its bid or proposal or at the time specified in the solicitation** the information requested on forms provided with the *[bid]* **solicitation** documents. The director will review the bidder's actions as set forth in the bidder's submittal documents and other factors deemed relevant by the director, to determine if a good faith effort has been made to meet the applicable *[percentage]* **contract goal**. If the bidder is judged not to have made a good faith effort, the bid shall be rejected.

(B) *[Bidders]* **A bidder** who *[demonstrate]* **demonstrates** that *[they have]* **it has** made a good faith effort to *[include]* **meet *[MBE/WBE]* the M/WBE and SDVE *[participation]* contract goal** will *[be awarded the contract]* **not have its bid rejected** regardless of the percent of *[MBE/WBE]* **M/WBE and SDVE participation**, provided the *[bid is]* **bid is** otherwise acceptable.

(C) In reaching a determination *[of good faith]* **that the bidder has made a good faith effort to meet the contract goal**, the director may evaluate, but is not limited to, the following factors:

1. The bidder's *[efforts to develop and sustain a working relationship with *[MBE/WBEs]* M/WBEs and SDVEs;]*, **attendance at pre-bid conferences for the solicitation.**

2. The bidder's efforts and methods to provide *[MBE/WBEs]* **M/WBEs and SDVEs with full sets of plans, *[and]* specifications, or appropriate *[sections thereof sufficient to prepare a proposal to the bidder;]* information in a timely manner to assist the M/WBE or SDVE in responding to the bidder's solicitation. This could include conducting market research to identify M/WBEs and SDVEs, and providing emails or written notices to all OEO certified M/WBEs listed in OEO's directory and listed SDVEs that specialize in the areas of work desired and which are located in the applicable area or surrounding areas as early in the acquisition process as practicable. Pro forma mailings to M/WBEs or SDVEs requesting bids are not alone sufficient to satisfy good faith efforts.**

3. *[The bidder's efforts and methods to find and inform multiple local MBE/WBEs and SDVEs about the proposed work in a timely manner and define for them the specific scope of work for which a proposal is requested;*

4.] The bidder's efforts to make initial contact with at least three (3) *[MBE/WBEs]* **M/WBEs and SDVEs for each category of work to be performed, its follow up with those contacted, and *[receive]* whether the bidder received a proposal for those categories of work[;].**

4. **The bidder's efforts to assist interested M/WBEs and SDVEs in obtaining bonding, lines of credit, or insurance as required by FMDC, or the efforts made to assist in obtaining necessary equipment, supplies, materials, or related assistance or services.**

5. *[Reasons for rejecting MBE/WBEs and SDVEs proposal;*

6.] The extent to which the bidder divided work into projects suitable for subcontracting to *[MBE/WBEs]* **M/WBEs and SDVEs[;]including, where appropriate, breaking out contract work items into economically feasible units, for example, smaller tasks or quantities to facilitate M/WBE or SDVE participation, even when the bidder might otherwise prefer to perform the work with its own forces. Prime contractors are not, however, required to accept higher quotes from M/WBEs or SDVEs if the price difference is excessive or unreasonable, but the fact that there may be some additional costs involved in finding and using M/WBEs or SDVEs is not in itself sufficient reason for a bidder's failure to meet the contract M/WBE or SDVE percentage, as long as such costs are reasonable.**

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

[8] 7. **The reasons provided by the bidder for the inability to reach a contract percentage, and the ability of other bidders to meet the percentages, if applicable.**

[9] 8. Actual past participation of [MBE/WBEs] M/WBEs and SDVEs achieved by the bidder.

9. The rejection of a M/WBE or SDVE solely because its quotation for work was not the lowest received is not a sufficient good faith effort. However, a bidder is not required to accept an excessive or unreasonable quote in order to satisfy contract percentages.

(D) When a non-M/WBE or non-SDVE subcontractor is selected over a M/WBE or SDVE, FMDC may require the bidder to submit copies of each M/WBE and SDVE and each non-M/WBE and non-SDVE quote to review whether M/WBE or SDVE prices were substantially higher, and FMDC may contact the M/WBE or SDVE subcontractor to inquire as to whether the firm was contacted by the prime bidder.

(7) Bidder's Duties and Responsibilities.

(A) [The] A bidder shall submit with [their] its bid or proposal the information requested [on the form provided] **as required in the solicitation** for [every] **each subcontractor, including [MBE/WBE] M/WBEs and [SDVE] SDVEs** the bidder intends to use on the contract work.

(B) If the [MBE/WBE] M/WBE and SDVE is a joint venture, and one (1) or more parties of the joint venture is not certified or listed as a [MBE/WBE] M/WBE and SDVE, the bidder shall submit with [their] its bid proposal the information requested on the form provided.

(C) The bidder shall use [MBE/WBEs] M/WBEs certified or approved by OEO or listed SDVEs **to meet the contract goal**. Certified [MBE/WBE] M/WBE vendors can be found at the OEO's website and listed SDVE vendors can be found on the [websites for the Division of Purchasing and Materials Management and FMDC] **FMDC's website**.

[(D) For construction projects bid by FMDC, MBE/WBEs certified by other municipalities, counties, and state and federal agencies that meet the basic requirements of the OA/OEO certification program may be used and counted toward achieving the goals, provided that the names and certifications of these MBE/WBEs are referred to OEO for subsequent follow-up and certification by OEO.

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

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

(8) *[Counting MBE/WBE and SDVE Participation Toward Meeting MBE/WBE and SDVE Goals.*

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

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

(C) A bidder may count toward their MBE/WBE and SDVE goals only expenditures to certified MBE/WBE and listed SDVE vendors that perform a commercially useful function in the work of a contract.

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

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

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

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

1. The bidder may count its entire expenditure to an MBE/WBE or SDVE manufacturer. For the purposes of this regulation, a manufacturer shall be defined as an individual or firm that produces goods from raw materials or substantially alters them before resale and is a certified MBE/WBE approved through the state of Missouri certification program administered by OEO or listed as an SDVE with the Division of Purchasing and Materials Management or FMDC.

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

Termination or Substitution of a M/WBE or SDVE.

If a contractor needs to substitute a M/WBE or SDVE subcontractor, the contractor, for good cause, must apply to the director for written approval to replace the entity.

(A) Before a contractor transmits to the director its request to terminate and/or substitute a M/WBE or SDVE, the contractor must give notice in writing to the M/WBE or SDVE subcontractor, with a copy to OEO and FMDC, of its intent to request to terminate and/or substitute, and the reason for the request. The contractor must give the M/WBE or SDVE five (5) working days to respond to the contractor's notice and advise OEO and FMDC and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why OEO and FMDC should not approve the contractor's request. If required in a particular case as a matter of public necessity (e.g., safety), the contractor may provide a response period shorter than five (5) days.

(B) For purposes of this subsection, good cause for approval of a request for termination or substitution for a M/WBE or SDVE includes the following:

1. The listed M/WBE or SDVE subcontractor fails or refused to execute a written contract.

2. The listed M/WBE or SDVE fails or refused to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal by the M/WBE or SDVE subcontractor to

perform its work on the subcontract resulted from the bad faith or discriminatory action of the prime contractor.

3. The listed M/WBE or SDVE subcontractor fails or refused to meet the prime contractor's reasonable, nondiscriminatory bond requirements.

4. The listed M/WBE or SDVE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.

5. The listed M/WBE or SDVE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings.

6. The listed M/WBE or SDVE subcontractor is not a responsible contractor as determined by FMDC.

7. The listed M/WBE or SDVE subcontractor voluntarily withdraws from the project and provides the prime contractor written notice of its withdrawal.

8. The listed M/WBE subcontractor is ineligible to receive M/WBE credit for the type of work required.

9. The listed M/WBE or SDVE subcontractor owner dies or becomes disabled with the result that a listed M/WBE or SDVE prime contractor is unable to complete its work on the contract.

10. Other documented good cause that FMDC determines compels the termination of a M/WBE or SDVE subcontractor. Provided that good cause does not exist if the prime contractor seeks to terminate a M/WBE or SDVE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the M/WBE or SDVE contractor was engaged or so that the prime contractor can substitute another subcontractor after contract award.

(C) If approved, the contractor must make good faith efforts to meet the contractual commitment to the contract goal. These good faith efforts shall be directed at finding another M/WBE or SDVE to perform at least the same amount of work under the contract as the M/WBE or SDVE that was terminated, to the extent needed to meet the contract goal. FMDC's approval shall not be arbitrarily withheld. If the contractor cannot obtain a replacement M/WBE or SDVE, it may apply to FMDC for a waiver or reduction of the contract goal by providing documentation detailing all good faith efforts made to secure a replacement and a good cause statement establishing why the contract goal cannot be met. If the contractor has met its burden of proof, FMDC, after consulting with OEO regarding M/WBE waiver requests, may grant a waiver or reduction of the M/WBE or SDVE contract goal.

1. The good faith efforts shall be documented by the contractor. If FMDC requests additional documentation under this subsection, the contractor shall submit the additional documentation within seven (7) calendar days, which may be extended for an additional seven (7) days if necessary at the request of the contractor.

2. FMDC shall provide a written determination to the contractor, after consulting with OEO regarding M/WBE waiver requests, stating whether or not good faith efforts have been demonstrated.

(9) Counting M/WBE and SDVE Participation Towards Goals.

(A) M/WBE and SDVE participation will be counted towards the contract goal only for the value of the work actually performed by the M/WBE or SDVE, including the cost of supplies and materials obtained or leased by the M/WBE or SDVE, but excluding supplies

and equipment purchased or leased by the M/WBE or SDVE subcontractor from the prime contractor or its affiliate.

1. A contractor's entire expenditure to be paid to a M/WBE or SDVE supplier or manufacturer for material furnished which becomes a permanent part of the contract work will be counted towards the contract goal. For the purpose of this regulation, a manufacturer shall be defined as an individual or firm that produces goods from raw materials or substantially alters them before resale.

2. The work a M/WBE or SDVE contractor commits to perform with its own forces as well as the work that it commits to perform with M/WBE or SDVE subcontractors and suppliers will be counted towards the contract goal.

3. When a M/WBE or SDVE performs as a participant in a joint venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the M/WBE or SDVE performs with its own forces will be counted towards the contract goal.

(B) A bidder may count towards the contract goal only expenditures to certified M/WBE and listed SDVE vendors that perform a commercially useful function in the work of a contract.

1. An M/WBE and SDVE vendor is considered to perform a commercially useful function when it is responsible for executing a distinct element of the work or the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

2. To perform a commercially useful function, the M/WBE or SDVE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

3. To determine whether a M/WBE or SDVE is performing a commercially useful function, OEO and FMDC will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the firm's credit claimed for its performance of the work, and other relevant factors. A firm does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of M/WBE or SDVE participation. In determining whether a firm is such an extra participant, FMDC will examine similar transactions, particularly those in which M/WBEs or SDVEs do not participate.

4. If a M/WBE or SDVE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the M/WBE or SDVE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the director will presume that it is not performing a commercially useful function.

5. When a M/WBE or SDVE is presumed not to be performing a commercially useful function as provided in paragraph (9)(B)4 of this section, the M/WBE or SDVE may present evidence to rebut this presumption. The director may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(C). The bidder may count its entire expenditures to M/WBE or SDVE suppliers

provided that the M/WBE or SDVE supplier performs a commercially useful function in the supply process.

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

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

(B) The amount and nature of awards made by the contractor to *[MBE/WBE]* **M/WBE** and SDVE vendors/suppliers/manufacturers; and

(C) Monthly reports from the contractor on its progress in meeting *[MBE/WBE and SDVE]* **the contract goals.**

[(10)] **(11).** Certification of *[MBE/WBE]* **M/WBE** Vendors.

(A) OEO, which was created under Executive Orders *[05-30]* **15-06** and 10-24, is responsible for the certification of *[MBE/WBE]* **M/WBE** vendors for the state of Missouri by following state regulation 1 CSR 10-17.040.

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

AUTHORITY: section 8.320, RSMo 2000. Original rule filed March 9, 1984, effective Aug. 11, 1984. Emergency amendment filed Dec. 10, 1985, effective Dec. 20, 1985, expired April 19, 1986. Amended: Filed Dec. 10, 1985, effective April 11, 1986. Amended: Filed Oct. 27, 2005, effective April 30, 2006. Rescinded and readopted: Filed Nov. 5, 2007, effective June 30, 2008. Amended: Filed June 1, 2011, effective Nov. 30, 2011. Amended: Filed April 5, 2016.*

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

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars (\$500) in the aggregate.

NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Commissioner of Administration, P.O. Box 809, Jefferson City, MO, 65102. To be considered, comments must be received within thirty (30) days after publication of this notice in the Missouri Register. No public hearing is scheduled.